UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

FREE SPEECH COALITION, INC., et al., Plaintiffs,	:	CIVIL ACTION
	:	Case No. 09-CV-4607 (MMB)
v.	:	Philadelphia, PA
	:	March 12, 2010
THE HONORABLE ERIC H. HOLDER, JR., Attorney General, Defendant.	:	1:55 p.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE MICHAEL M. BAYLSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs:

J. MICHAEL MURRAY, ESQUIRE
LORRAINE R. BAUMGARDNER, ESQUIRE
Berkman, Gordon, Murray & Devan
55 Public Square
Suite 2200
Cleveland, Ohio 44113

J. PETER SHINDEL, JR., ESQUIRE
Pietragallo, Gordon, Alfano,
Bosick & Raspanti, LLP
1818 Market Street
Suite 3402
Philadelphia, Pennsylvania 19103

For Defendant:

KATHRYN WYER, ESQUIRE
U.S. Department of Justice
Civil Division
20 Massachusetts Avenue
Washington, D.C. 20530

APPEARANCES: (Continued)

Amicus Curiae:

FRED T. MAGAZINER, ESQUIRE
Dechert, Price & Rhoads
1717 Arch Street
4000 Bell Atlantic Tower
Philadelphia, Pennsylvania 19103

CARL A. SOLANO, ESQUIRE
Schnader, Harrison, Segal & Lewis
1600 Market Street
Suite 3600
Philadelphia, Pennsylvania 19103

MARY CATHERINE ROPER, ESQUIRE
ACLU of PA
P.O. Box 40008
Philadelphia, Pennsylvania 19106

KRISTINA CAROL EVANS COLE, ESQUIRE
Dechert, LLP
Cira Centre
2929 Arch Street
Philadelphia, Pennsylvania 129104
Kairys & Rudovsky
924 Cherry Street, Suite 500
Philadelphia, PA 19107

VICTOR S. PERLMAN, ESQUIRE
2005 Market Street
Philadelphia, Pennsylvania 19103

Audio Operator: Milahn Hull

Transcribed by:

DIANA DOMAN TRANSCRIBING
P.O. Box 129
Gibbsboro, New Jersey 08026-0129
(856) 435-7172
FAX: (856) 435-7124
EMAIL: dianadoman@comcast.net

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I N D E X

THE COURT: Okay, good afternoon.

MR. MURRAY: Good afternoon, Your Honor.

MS. WYER: Good afternoon, Your Honor.

THE COURT: Please be seated, everyone.

Okay, we're here for oral argument and other matters that may come up in a case captioned Free Speech Coalition, Inc., et al. vs. Eric Holder, Attorney General. And I appreciate having the appearance forms filled out for the plaintiffs, Mr. Murray.

MR. MURRAY: Yes, Your Honor. Good afternoon.

THE COURT: All right, good afternoon. And with you Ms. Baumgartner.

MS. BAUMGARTNER: Good afternoon, Your Honor.

THE COURT: All right, how are you. Mr. Shindel.

MR. SHINDEL: Good afternoon, Your Honor.

THE COURT: All right, good afternoon to you. And for the defendant, Ms. Wyer.

MS. WYER: Good afternoon, Your Honor.

THE COURT: All right, how are you all. Okay.

I also have some Amicus here, Mr. Magaziner, pleasure to see you.

MR. MAGAZINER: Good afternoon, Your Honor.

THE COURT: Mary Catherine Roper, pleasure to see you. Who else is there, who I don't know?

MS. COLE: Kristina Evans --

THE COURT: What's your name?

MS. COLE: Kristina Evans Cole.

THE COURT: How are you. All right, good afternoon. Anybody else want to note their appearance? Mr. Solano, how are you?

MR. SOLANO: Good afternoon, Your Honor.

THE COURT: You can sit in the front seat if you like, in the front row. What?

MR. SOLANO: I'm fine, thank you.

THE COURT: All right. Okay. I did say I would hear some argument by the Amicus if they're interested, and I will certainly do that.

The main purpose of this hearing is to hear oral argument on the defendant's motion to dismiss. That's the primary purpose. But as I indicated in a procedural order that I sent out a few days ago, since everybody's here together today, I am interested in talking briefly about the motion for preliminary injunction.

But I agree with the Government in general that I should pay primary attention to the motion to dismiss. And at least not until I'm satisfied that I'm going to deny that in whole or part should the parties get into discovery or should I start having -- taking evidence. So I mean I agree conceptually with what you said in your conference report, Ms. Wyer -- did I pronounce that correctly, Wyer?

MS. WYER: Yes.

THE COURT: Okay. So, I mean, conceptually I agree that that determination should come first. It may be, because there's a lot of different issues in this case, that I conclude that there's some aspects of the plaintiff's claims that should be dismissed but that others should go forward, at least for some discovery. I don't know that, I haven't determined that. But there are a lot of different claims.

The first thing I do is I want to ask Ms. Wyer, in your conference report you said that the Court doesn't have subject matter jurisdiction. Can you just explain what you meant by that?

MS. WYER: We have moved for -- our motion to dismiss raised a (b)(1) claim in regard to the Fourth Amendment issue.

THE COURT: Yes, but that's only one part of the case. You're not asserting that I don't have subject matter jurisdiction over any part of the case?

MS. WYER: No, but there are various aspects of the First Amendment claim where we have argued that there is no standing. And there's also a question of res judicata in regard to two of the plaintiffs. As I have lopoked at the files for the previous cases, I've discovered that two of the plaintiffs in this case have actually fully litigated their First and Fourth Amendment claims in the District of Colorado

case.

THE COURT: All right, who are those?

MS. WYER: The Free Speech Coalition and David --

THE COURT: What's the last name, sorry?

MS. WYER: The Free Speech Coalition, the organization, and David Connors.

THE COURT: And David?

MS. WYER: Connors.

THE COURT: Connors. All right, I don't recall that you briefed that.

MS. WYER: We haven't raised that in our motion.

THE COURT: All right, well, let me say at the outset, I'm going to be asking a lot of questions today, and I intend to give everybody a chance, if they want, to file a supplemental brief on some of the questions I ask if you don't think your initial briefs cover it enough. So that would be one aspect that you ought to bring up in a supplemental brief, and of course the plaintiffs would have the chance to argue that.

All right, now, the way I generally proceed, rather than just have one side argue completely and then the other, is I'd sort of like to cover some of the questions I posed in my order of March 8th, and then I have other questions as we go along, and I will in general hear both sides back and forth as we go through these.

So, the first question is as to 2257 itself, which was the subject of the Sixth Circuit decision, I'd like to know if the plaintiffs assert there are any material factual differences between this case and the case in front of the Sixth Circuit.

MR. MURRAY: Yes, Your Honor.

THE COURT: Mr. Murray, yes.

MR. MURRAY: Thank you very much.

Yes indeed, Your Honor, there are very substantial and extensive material factual differences between the record that we will be making here and the record that was made in the Connection case. The record --

THE COURT: You were counsel in the Connection case?

MR. MURRAY: I was.

THE COURT: Okay.

MR. MURRAY: Yes, I was, Your Honor.

And the record and facts in that case were very narrowly focused on the effect of the statute upon Swingers magazines.

Now, I will tell you we had extensive evidentiary hearings, two of them, one in 1996, believe it or not, 14 years ago, and one in 2005. But the evidence was focused upon Swingers, who they were, what their ages were. It was focused upon their desire for anonymity. It was focused upon their refusal to submit photo identification to the Government. It

was focused upon the issues surrounding the effect upon those particular publications that the statute had.

And that was the record. And it was made in that fashion because it was primarily it began as an applied attack by this particular discrete magazine publisher.

Here, however, we have a much broader factual and legal attack upon 2257 by a much more disparate group of plaintiffs. We do have the Free Speech Coalition, which itself represents the entire adult industry, and we have facts in support of our constitutional claims on behalf of the entire adult industry, none of which were presented in the Connection case --

THE COURT: Well, would those factual differences only apply to the as applied challenge as opposed to the facial challenge?

MR. MURRAY: No, it will apply to the factual challenge as well, Your Honor.

THE COURT: Well, why would it also apply to the facial challenge? I mean, the statute's the same, is it not?

MR. MURRAY: Well, it is the same. However, the facial challenge on behalf of the adult industry for example will focus upon the fact that the Government will not be able to prove that a problem existed in the first instance.

We will put on evidence on behalf of the industry to the effect that long before 2257 became enforceable in July of

1995, dating back into the 1980's, the maintain adult entertainment industry scrupulously took care to obtain photo identification from all performers, and was scrupulous in its adherence to make sure that no minors ever appeared in adult films.

Now, in a First Amendment challenge, upon a statute that is this burdensome, that poses a potential five-year prison term, and imposes all the onerous requirements that it imposes, we think the case law is clear that the Government has to prove a couple of things; is there really a problem, to begin with. Playboy Enterprises we think makes that clear. That was the signal bleeding case. And there the Government posited that cable providers --

THE COURT: So you think that's part of the -- that's a burden of the Government as to the facial challenge --

MR. MURRAY: Yes.

THE COURT: -- is showing the problem.

MR. MURRAY: Yes. Because they have to show the existence --

THE COURT: Well, why can't I accept the findings of Congress, that if Congress felt there was a problem, why -- and I'm only talking about the facial challenge now.

MR. MURRAY: Yes.

THE COURT: But if Congress, you know, delineated

what it felt was a problem, why would I take evidence about that? I mean, I can't, you know, I'm not a -- I'm not sure I understand what -- and I'm not an expert on the Playboy case either, but I'm not sure that holds what you're saying, but I'll check it.

But I'm talking solely about a facial challenge, why do I have to get into the Government's proof? I thought that the issue on a facial challenge is to look at the language of the statute and determine whether on its face, it violates the Constitution?

MR. MURRAY: Well, that is true, Your Honor, but in order for it to be sustained under the First Amendment, there has to be proof that a governmental interest exists, that the statute furthers that governmental interest, and depending upon whether strict scrutiny or intermediate scrutiny applies that it either, in the case of intermediate scrutiny, doesn't substantially burden more speech than necessary, or in the case of strict scrutiny, is the lease restrictive means.

Now for example, in the Playboy case, Congress made a determination that signal bleed by purveyors of sexually explicit material on cable TV stations was a sufficiently serious problem to justify a statute that required them to either fully scramble their signals or only limit showing their movies between the hours I think of ten p.m. and six a.m., the safe harbor period.

There was a trial, a full trial, at which the Government was put to its burden of proof ultimately to demonstrate the existence of that problem, to demonstrate that the statute, which in that case was content based and therefore had to satisfy strict scrutiny, that that statute furthered the Government's compelling interest, and that it did so in the least restrictive way.

One of the things that the Supreme Court said was that there's very little evidence in the record that would suggest that signal bleed was a problem, let alone that it was a serious enough problem to require or to entitle the Government through a statute to burden the substantial amount of speech that was being burdened by the hours of operation provision.

And, the Court said we understand that the Government and Congress in passing a law is saying that millions of children are exposed to these sexually explicit images when they're not fully scrambled by the TV cable networks, but the Supreme Court said there's little evidence that that's even true, and there's little evidence that it's even a serious problem. And when the Government legislates in the area of protected speech in a way that imposes burdens upon that speech, the Government has to do more than simply posit the existence of a problem. The Government has to demonstrate that it's a problem that really exists, and that

justifies the burden on speech.

THE COURT: Okay, now I'm going to hear Ms. Wyer's response to that.

All right, we're limited now to talking about a facial challenge to 2257 and whether any evidence would be required by the Government or anybody else would even be relevant.

MS. WYER: No, I mean no evidence, no evidentiary findings are -- any further evidentiary findings are necessary there, Your Honor.

And let me go back to the question of what is different in this case versus previous cases. In terms of the facial challenge, there has been no statutory change to 2257 since the Connection case, except that the category of lascivious exhibition of the genitals has been added to what qualifies as subject to the age verification and record keeping requirements.

THE COURT: Well, that's in 2257(a).

MS. WYER: The lascivious exhibition --

THE COURT: It applies to 2257.

MS. WYER: I think 2257 itself was amended because lascivious exhibition is one category of actual sexual conduct.

THE COURT: Okay, all right, well, then we'll come back to that.

MS. WYER: Okay.

THE COURT: I mean that's a -- that's a discrete issue in my opinion.

MS. WYER: Okay.

THE COURT: All right.

MS. WYER: Well, in regard to the evidential question on --

THE COURT: Now what's your argument about the Playboy case and about the plaintiffs say I need to take testimony. You need to prove that there was a problem and that is something that I need to do based on the factual record in this case, which is different than what was in front of the Sixth Circuit.

MS. WYER: The Playboy case does not require that result here. First of all, the Playboy case was --

THE COURT: Does not require what?

MS. WYER: The result -- the conclusion that evidence is necessary here.

For one thing, the Playboy case, as the plaintiffs indicated, was a strict scrutiny case and the evidentiary issue that the Court was, that the Supreme Court was focused on was whether the mechanism that Congress had devised was the least restrictive means.

After that decision was issued, the Sixth Circuit addressed, or directed the District Court to address what

impact the Playboy case had in the Connection case, and the Court concluded that it was not applicable because Playboy was --

THE COURT: Which Court concluded that?

MS. WYER: The District -- first the District Court, the Northern District of Ohio, but then the Sixth Circuit En Banc Court also affirmed that conclusion.

THE COURT: That Playboy did not apply?

MS. WYER: Right.

THE COURT: Were you counsel in that case, in Connection as well?

MS. WYER: No, I was not.

THE COURT: Okay. And have you read the record, or are you familiar with it?

MS. WYER: I have looked at a lot of the record and I've read the decisions.

THE COURT: Okay.

MS. WYER: But it's in the decision that goes through the different -- there was a whole group of cases where the District Court was --

THE COURT: Is this in the en banc decision?

MS. WYER: There are so many different opinions.

THE COURT: Well, I'm talking about the opinion, the last opinion, which is February 20th, 2009, reported at 957 -- no, sorry -- 557 F.3d 321 -- is it 557?

(Pause)

THE COURT: I don't remember reading, it doesn't mean it's not there.

MS. WYER: I know that there was one case where it went through all of the new cases including the Playboy case and concluded that they were inapplicable. It's in the Northern District of Ohio --

THE COURT: All right, is that in your --

MS. WYER: -- 2006 case --

THE COURT: -- brief?

MS. WYER: I don't recall.

THE COURT: All right, well, make a note that this may be something else that may need to be part of a supplemental brief. Okay.

All right, now, I'll hear Mr. Murray's reply briefly and then we'll go onto the next issue -- are you don't on this issue or --

MS. WYER: No.

THE COURT: ALL RIGHT.

MS. WYER: I also wanted to point out that it's not only the Sixth Circuit Connection case that has addressed this, it's also every time the plaintiffs mount a facial challenge to the statute, which has happened in three different jurisdictions, the plaintiffs have raised this argument that first of all, that they themselves don't engage

-- there's no risk as far as they're concerned. But the Courts have repeatedly indicated that that was no basis for overturning the statute on its face.

And the Sixth Circuit Court and the DC Circuit addressed issue -- that issue, and recognized that -- all the Courts have addressed that the record as Congress concluded, when the statute was first enacted in 1988, Congress based its decision to enact that requirement in 1988 on 14 months of investigations by the Attorney General's Commission on pornography. Following that there were Senate hearings. And the Commission actually specifically recommended that this age verification and record keeping system be implemented.

So Congress, based on that finding, that is a sufficient basis for Congress's action. That together with the common sense inference that was based on the reality that there's assessed societal preference for younger looking performers in sexually explicit materials.

There's no doubt that -- I mean, the Turner Broadcasting Supreme Court case emphasized that Congress's findings are entitled to a significant amount of deference, not only in regard to its factual findings, but in regard to its predictive judgments. But Congress has the -- is entitled to make predictive judgments based on the information before it. Here, that's what happened. The evidentiary basis was the preference for younger looking performers. Based on that,

it made the common sense inference --

THE COURT: Well, you said the DC Circuit had agreed with the Sixth Circuit. What case are you replying on for that?

MS. WYER: The American Library Association case, the 1994 --

THE COURT: Okay. All right. Okay.

MS. WYER: -- decision.

THE COURT: Okay, thank you.

All right, now can I turn the floor back to Mr. Murray. Do you want to reply briefly on this issue, the facial challenge --

MR. MURRAY: Yes, Your Honor --

THE COURT: -- and the burden of proving facts.

MR. MURRAY: Yes. And I was going to then tell you what other facts were going to -- that are going to be different.

One of the issues that the Sixth Circuit said the record was not sufficient on was, for example, on the over-breadth issue. And so all the evidence that I'm describing -- and that's a facial attack as well, Your Honor, and all the evidence that I'm describing, including with the respect to the adult entertainment industry will go to not only the over-inclusiveness issue, whether the statute's narrowly tailored, but it also goes to the facial over-breadth challenge, which a

plaintiff is always, I believe, entitled to try to put on evidence to demonstrate the scope of the statute and the type of constitutionally protected speech to which it applies.

So in addition to the evidence that we will offer by the adult industry, we have a number of other plaintiffs who have evidence that addresses the facial issue of over-breadth and the narrow tailoring insofar as the statute burdens that type of speech.

For example, the American Society of Media Photographers is a plaintiff. Journalists, photographic journalists who are burdened and affected by this statute. They have 7,000 members. They -- we will put on evidence of the burdens that the statute imposes upon them.

We have numerous photographers, artists, sex therapists, producers of educational films, researchers, educators, website producers, they will put on evidence which was not in the record in Connection which will demonstrate why the statute is not narrowly tailored, is over-broad, and how significantly it burdens their constitutionally protected speech.

None of which, of course, was in the record before Connection, which was one of the criticisms -- not criticism, but was one of the reasons that the majority said that we can't say that the statute is over-broad because the record is too thin on precisely the kinds of points that I'm talking

about.

We will also offer evidence that wasn't in the record in Connection of the millions of Americans who email now, who sexting is a phenomenon now, who participate in social networking sites, enter chat rooms, post videos and images on YouTube and other tube sites, all again to show the over-breadth and the lack of narrow tailoring, the very type of evidence that the majority in Connection said was lacking in the case before them. So --

THE COURT: All right, go ahead, you want to sum up because --

MR. MURRAY: Yes.

THE COURT: -- I want to move on to on apply -- the as applied challenge.

MR. MURRAY: Yes, Your Honor. And so we fully intend to create a factual record that is far more extensive and it will be far more current too.

THE COURT: All right. Now, let's turn to the as applied aspect of Connection. I am sure that incorporating what you just said about the facial challenge would apply as well to your as applied challenge.

MR. MURRAY: Yes, Your Honor.

THE COURT: And that you would differentiate that.

Now, the first thing is, in the Connection case, which is I thought a little unusual, not that I'm perhaps

nearly as expert as you are, but I thought most Courts in dealing with this, usually deal with facial challenge first and then go to the as applied challenge. Whereas the Sixth Circuit seemed to do it the other way around.

Do you have any comments about that?

MR. MURRAY: I think that -- I think it's a matter of judicial discretion, Your Honor.

THE COURT: Okay. All right, well, now, turning to the as applied, the first holding there was that intermediate scrutiny applies. Now I presume you disagree with that?

MR. MURRAY: I do.

THE COURT: All right, now, are you saying that I should, as a matter of law, decide that the Sixth Circuit was wrong and that strict scrutiny applies. Or that after you produce all this evidence that you've been talking about, I will then -- I should then conclude that strict scrutiny applies?

MR. MURRAY: No, I think --

THE COURT: Or both?

MR. MURRAY: No, I think that you can determine the issue of strict scrutiny based upon the legal arguments without regard to the evidence.

THE COURT: All right. Well, now that -- so you're saying the Sixth Circuit was wrong as a matter of law.

MR. MURRAY: Yes. The dissenters were right and the

majority was wrong.

THE COURT: All right. Now, do you have anything -- and remember, and I may say this more than once today and if so, forgive me -- you know, I'm a lonely District Court judge sitting by myself, okay?

MR. MURRAY: Yes.

THE COURT: This was the Sixth Circuit, en banc, and the Supreme Court denied cert. Now, I just want to be candid with you. You're going to have to -- before I'm willing to depart from that kind of a holding with the Supreme Court denying cert, you're going to have to persuade me that there's a Third Circuit case that mandates that I find strict scrutiny. I'm just -- I want to just be candid with you, okay?

I'm not going to buck the Sixth Circuit unless you convince me that I have to because of Third Circuit juris prudence -- this relates to another question in my order. So tell me where I find that Third Circuit case.

MR. MURRAY: I will, Your Honor. But just so that there's no misunderstanding. We also believe that we can prevail under intermediate scrutiny.

THE COURT: Oh, I'm sure I understand that. But let's talk about which one applies.

MR. MURRAY: Okay. The Brown case out of the Third Circuit that was decided --

THE COURT: Okay, I'm looking at it --

MR. MURRAY: -- just last October --

THE COURT: I've read it, yes.

MR. MURRAY: One thing --

THE COURT: Now that's a case which involves the abortion issue.

MR. MURRAY: That is correct, Your Honor. And one of the things that's important about that case -- I think it's important to remember, the Sixth Circuit never addressed the argument that I'm making here that the exemption in 2257(a) makes 227 -- 2257 content based. Because we filed the appeal before that new law was passed.

THE COURT: Well, I'm sure you're going to make that argument, and we're going to come to 2257(a), but you know, that applies to the certification procedure, which in my view is a subset of the overall issue here.

MR. MURRAY: Yes.

THE COURT: But let's -- I promise you we'll come to that.

First of all, you tell me -- I'm looking at Brown. You tell me where in Brown I -- there's a holding that I have to apply strict scrutiny instead of intermediate scrutiny to your complaint.

MR. MURRAY: Well, I think -- I can't say it was the holding because they ended up avoiding the issue by construing

the ordinance but what they said was they --

THE COURT: All right, well --

MR. MURRAY: -- had to -- in order to avoid strict scrutiny under that ordinance, they had to construe the exemption in that ordinance for police officers, fire personnel, and employees of the medical clinics. They had to construe it to prevent them from engaging in the speech which was otherwise prohibited to the other citizens.

THE COURT: All right, well, what makes that -- from what -- how from that do you reach some conclusion that strict scrutiny would apply to this case?

MR. MURRAY: Because 2257(a) creates an exemption solely on the basis of content. If you're a commercial producer of simulated sexual material, you don't have to comply with the record keeping, inspection, labeling regime. All you have to do is send in a letter to the Attorney General.

But if you're a producer identically situated, same business practices, same operation, and you produce actual explicit material, you don't get the exemption.

And the only difference is the content of the materials.

THE COURT: We'll come back to that when we deal with 2257(a). But that's your answer, that that's why you think Brown would require strict scrutiny in this case?

MR. MURRAY: Yes.

THE COURT: All right.

MR. MURRAY: Because there's no justification for that difference in content treatment.

THE COURT: Okay. All right. Okay, now, let me go to my next question.

All right, the next question was, do you rely on -- well, first of all, I'm going to give Ms. Wyer a chance to respond to that last one. So this is the argument that I should apply strict scrutiny to the as applied challenge.

MS. WYER: Your Honor, I think Brown is consistent with Supreme Court case law in recognizing that a requirement is -- cannot be deemed content based unless it reflects the Government's disagreement with the message conveyed. If the Government is trying to express disapproval with a particular message, that is what makes a regulation content based.

But where, as here, the purpose of the regulation is clearly not to express disapproval of any protected form of speech, but is aimed at preventing the exploitation of children and the creation of sexually explicit images, and to prevent child pornography which is not protected, that is simply not a situation where a content for strict scrutiny should apply.

Again, this is an issue that every jurisdiction that has looked at these requirements in the past has determined

that intermediate scrutiny is the appropriate level of scrutiny. Not only the Sixth Circuit, but also the DC Circuit and the District of Colorado have looked at that issue. The same arguments that are made here were made in those cases, and all three jurisdictions concluded that intermediate scrutiny was the appropriate level.

THE COURT: Okay, all right, thank you.

All right, let's go to the next question, and that is whether -- well, let me put it -- let me ask you this way, Mr. Murray. Are there any other Third Circuit cases that you think are binding -- relevant and binding on me in determining this?

MR. MURRAY: Just the content based issue or the question of whether to follow the majority in Connection?

THE COURT: Anything.

MR. MURRAY: Yes, I do, Your Honor.

THE COURT: Aside from the certification --

MR. MURRAY: Yes.

THE COURT: -- issue.

MR. MURRAY: I think that there are a number of Third Circuit cases that to me demonstrate that the Third Circuit is much more in harmony with the dissent in Connection than it is with the majority in Connection.

And I think you need only to begin by comparing the Third Circuit's decision in Conchatta with the Sixth Circuit's

decision in a case called J.L. Spoons vs. Dragani which is at 538 Fed 3d 379.

THE COURT: Wait, 538 F.3d 379?

MR. MURRAY: Yes.

THE COURT: All right.

MR. MURRAY: In Conchatta --

THE COURT: What's the citation of Conchatta?

MR. MURRAY: It's in the brief, Your Honor, that's the only reason I didn't --

THE COURT: Well, how do you spell it then?

MR. MURRAY: C-O-N-C-H-A-T-T-A. Conchatta vs. Miller Third Circuit decision 2006, we cited it extensively in the --

THE COURT: I'm looking at your memo. I don't see it here. But let me have the site anyway.

MR. MURRAY: Yes, Your Honor. It's 458 Fed 3d 258, Third Circuit 2006.

THE COURT: Okay.

MR. MURRAY: Now in that case, the Third Circuit struck down as unconstitutionally, over-broad, a Pennsylvania statute and regulation that essentially prohibited nude dancing in liquor permit establishments. They applied intermediate scrutiny to the statute and regulation. And they found it to be over-broad because it applied to thousands of liquor permit holders outside of the adult cabaret context who

might present serious artistic productions involving nudity.

The Sixth Circuit, two years later, in the J.L. Spoons case, rejected an identical over-breadth challenge to the same prohibition that Ohio law had on nude entertainment in liquor permit premises on virtually the exact same evidentiary record that was in front of the Third Circuit, proof that it involved thousands of mainstream venues that presented serious artistic performances, and in fact the dissent -- it was a two-to-one decision, the dissent in the Sixth Circuit pointed out that it was in direct conflict with the Third Circuit's decision in Conchatta.

Conchatta is extremely important for yet a second reason as to how the Third Circuit will treat Connection. In rejecting the facial over-breadth challenge, the 2257, the Sixth Circuit majority placed great emphasis upon the Government's representations that it had not brought prosecutions against private couples, for example, and that it had no intention of enforcing the statute in that fashion.

The Third Circuit in Conchatta was presented with the very same argument by the state of Pennsylvania; namely that he argued there the law had only been applied to fully nude presentations by adult cabarets, and that they had no intention of applying it to the mainstream artistic concert or theatrical type venues.

Whereas the Sixth Circuit majority in Connection

found that -- basically accepted the Government's representation in rejecting the over-breadth challenge, the Conchatta Court rejected both of these contentions as a basis for saving the statute from an over-breadth analysis. They said the past practice of enforcement doesn't change anything; you look at the statute and see what it potentially covers. Nor does the claim that they won't enforce it in the future matter. Current enforcement intentions are of no relevance to their analysis.

And so -- and if you look at the opinions of the dissenters in Connection, you will find that they are in complete harmony with the Third Circuit's decision in Conchatta, whereas the majority in Connection is at odds with the Third Circuit's decision in Conchatta.

The U.S. vs. Stevens, the Third Circuit decision that struck down 18 U.S.C. Section 48, which is the one that prohibits commercial production of depictions of animal cruelty. As Your Honor probably recalls, that case has been argued in the Supreme Court, and it's awaiting decision on the merits. But the Third Circuit struck it down, and at the very end of the -- and it was an en banc opinion by the Third Circuit, and at the very end, in footnote 16, the Court discusses the question of over-breadth and how that issue is to be analyzed. And again, they end up not reaching the issue because they struck it down on other grounds, but they

described the way you do it. And it's exactly the way the Conchatta Court said, and the dissenting opinions in Connection. You have to look at the plain language of the statute and pose reasonable but challenging hypotheticals to determine the statute's reach.

And then the Court did just that, and they pointed out again that in several hypothetical examples of constitutionally protected depictions, the statute covered them. And the only protection that a citizen would have were two things. There was a statutory provision that exempted serious works, or, prosecutorial discretion; just like the Government represented in Connection in the majority. And they said we do not believe that the constitutionality of Section 48 should depend on prosecutorial discretion for a statute that sweeps this widely.

That's exactly what the dissenters in Connection said. And that's at odds, entirely at odds, with what the majority said.

And then the other Third Circuit decisions which I think make it abundantly clear that the Third Circuit would follow the dissent in Connection rather than the majority, are the two most recent COPA decisions, the Child Online Protection Act, where the ACLU versus whoever the Attorney General was at the given time.

Both of those decisions, and that's been up and down

the Courts, and on two occasions --

THE COURT: That's the case Judge Reed had, I think --

MR. MURRAY: Yes. Yes, Your Honor.

The Third Circuit renders three decisions in that case, the last two of which have been affirmed by the Supreme Court.

THE COURT: Right.

MR. MURRAY: The last two are the ones I'm talking about.

If you look at those opinions, you will discover -- this was the statute that made it a crime for a commercial enterprise to knowingly put on the web material harmful to juveniles if it was designed to reach juveniles, and they defined harmful to juveniles by a three-part modified Miller obscenity test.

And the Third Circuit struck it down for a multitude of reasons. One of which addressed the fact that the Government said well, you've got an affirmative defense if you use credit cards or an adult ID card, some way to ensure that you're not presenting the material to minors. And the Court -- and this is what I think is significant -- in both the 2003 and the 2008 opinions, gave great weight to the burdens and chilling effect on speech posed by the requirements that users, people who wanted to view this speech, would have to

give up their anonymity as a condition of accessing constitutionally protected sexually explicit speech.

The Court stressed that point in the 2000 opinion at 322 Fed 3d 259 and 260, and in the 2008 opinion at 534 Fed 3d 196 and 197.

The significance of that is that the majority in the Connection case gave virtually no weight to the interests of the swingers in that case in anonymity, and to the chilling effect of the statutory scheme that requires citizens to report to the Government that they are posting sexually explicit images of themselves. Indeed, the majority dismissed that concern and stated, quote, “They have no more to complain about than every taxpayer in the country”.

Well, the dissenters in Connection said no, there is a substantial interest in anonymity when you’re talking about provocative material, particularly private or sexual practices, and the right to engage in controversial sexually explicit speech anonymously. And that was one of the reason that the dissenters thought that 2257 was unconstitutional because it totally eliminates that anonymity, and because citizens have to tell the Government about their sexual practices.

On this point again, both of the Third Circuit COPA decisions are in complete harmony with the dissenting opinions in Connection and are at complete odds with the majority

opinion in Connection.

THE COURT: All right, any other cases?

MR. MURRAY: And so those are the Third Circuit cases, Your Honor --

THE COURT: Okay, let me hear from Ms. Wyer on this point.

MS. WYER: In regard to the over-breadth issue, it has to be emphasized that the Connection case found the only possible area that the statute could conceivably be considered over-broad is in regard to its application to private couples. Otherwise, there is -- clearly the over-breadth analysis requires a comparison of the statute's legitimate read versus application to protected speech where it didn't have a purpose. So --

THE COURT: What I want you to address now, the Third Circuit case law that you think would support Connection -- the Connection majority. Mr. Murray was detailing a number of Third Circuit cases where he said that the Third Circuit had some cases that were at variance with the Connection majority. So I want to know if you want to respond to that. If you'd rather do that in a supplemental brief, you may.

MS. WYER: I may, because I have not looked --

THE COURT: Okay.

MS. WYER: -- Conchatta case. But I do want to say in regard to Brown and the notion of the -- the exceptions

that the Court was looking at in regard to the demonstrations in front of the clinics, the Court looked at those as -- this goes back to the content base rather than over-breadth, but it looked at those exceptions as possibly going to the content, because the demonstrators that would be allowed within the zone would be expressing an anti -- a pro-choice position, whereas those excluded from the zone would be anti-abortion.

And so there was a content based distinction there, whereas here the only exception that the plaintiffs are talking about is the certification option in 2257(a) which first of all does not exclude any producer from having to verify the ages and keep records, it just is a different method for them to do so.

So the exception distinctions between Brown and here are completely different.

In regard to the anonymity issue that the plaintiffs were just talking about and that the COPA case addressed, the Supreme Court case law on anonymity in McIntyre and Watchtower that -- where anonymity is a real issue is in the sphere of the core political speech for the most part. McIntyre dealt with core political speech.

The Watchtower case, the Third Circuit has actually recognized that Watchtower was a very fact specific decision, in Riel vs. City of Bradford 485 F.3d 736. And --

THE COURT: Say that again.

MS. WYER: In R-I-E-L vs. City of Bradford in 485 F.3d 736, a 2007 Third Circuit case, and Watchtower was a situation where the anonymity concern had to do with people going from door to door distributing pamphlets. And the Supreme Court referred to the interest in anonymity there in that context, but that kind of activity is direct -- very closely connected to political expression.

Whereas here, this kind of expression, even though it does receive First Amendment protection, the Supreme Court has recognized that it is really on the margins of First Amendment protection. In the Young vs. American Mini Theaters case 427 U.S. 50, this type of expression is of a wholly different and lesser magnitude than the interest in untrammeled political debate. The interest in anonymity in this context does not outweigh the Government's interest in the intermediate scrutiny analysis of protecting children from exploitation through these age verification requirements.

THE COURT: All right, thank you.

Okay. All right, now, let's -- just give me one second here.

(Pause)

THE COURT: I want to talk -- I'd like to ask some questions about the burden of proof. Because the Third Circuit talked about it in the Brown case, and it was frankly a little confusing to me, and the plaintiffs dwell on this a

great deal in their briefs in this case. And they -- plaintiffs keep insisting that the Government has the burden of proving this and proving that.

Now, in -- and I -- I don't know that the Supreme Court has ever really laid out in a single case the allocation of burdens in this context.

Now I would -- in terms of the motion to dismiss, I don't think there's so much of an issue of burden as there are a decision to be made as to whether the complaint states a claim upon which relief can be granted. And that means that I have to take the factual allegations as true, and then determine whether under those facts, the plaintiffs would be entitled to have a jury decide in their favor.

The -- and I'm not talking about Twombly and Iqbal in this context, so don't -- let's not get into that. This is not a notice pleading case. There's lots of facts in the complaint. It's a very detailed complaint, and it's plausible and it's -- and so forth. So I'm not into that -- in that debate that's going on these days.

But, so I really have these questions. On the Rule 12 motion, Mr. Murray, do you contend I should do anything other than what a judge traditionally does in assessing a Rule 12(b)(6) motion; that is you look at the facts, as I said, and see whether they're sufficient to -- that if they were, assuming they were proven at trial and a jury accepted them,

the plaintiffs would be entitled to win.

Secondly, if we were to start a preliminary injunction proceeding, do you agree or disagree that you would have the burden of proceeding, and then we could argue about whether at some point the burden shifted to the Government to prove certain things?

Those are the two questions, that I would like to -- and whether that -- whether that burden would be different any different at trial on the preliminary injunction as opposed to a trial. Go ahead.

MR. MURRAY: Yes, Your Honor. No, I think that you're right, that the legal standard for the 12(b)(6) is the one that you enunciated.

The only thing that I would say with respect to burden of proof is that the backdrop for that motion to dismiss is the recognition that the rule of law that would ultimately apply as to the constitutionality of a regulation of speech is one that requires the Government to prove the regulation of speech meets either intermediate scrutiny or strict scrutiny.

THE COURT: Okay.

MR. MURRAY: Which seems to me bears on the plausibility of the plaintiffs' claims.

THE COURT: All right, okay. Well, now on that point, so your point is that whether I find strict scrutiny or

intermediate scrutiny, whichever they are, then the burden shifts to the Government to show either a compelling state interest or something -- or the other requirement.

And you -- okay, well, first of all, Ms. Wyer, do you agree with that, just as an abstract legal proposition?

MS. WYER: Whether the Government has the burden under --

THE COURT: Well, whether there's a burden on the Government to show a compelling state interest or compelling a rational, you know, relationship between the regulation and the objective.

MS. WYER: Yes, it is the Government's burden to show that the intermediate scrutiny elements are satisfied. But it can do so based on the congressional findings that have already --

THE COURT: All right. And the same thing with, if there was strict scrutiny, you'd have the burden of showing a compelling state interest, is that right?

MS. WYER: Right.

THE COURT: You would have the burden of showing that Congress considered that there was a compelling state interest, right?

MS. WYER: On the facial challenge, correct.

THE COURT: Facial challenge.

MS. WYER: Correct.

THE COURT: Okay. Now what about on an as applied challenge?

MS. WYER: On an as applied challenge, I disagree to the extent that plaintiffs are saying that the Government has the burden to show that the requirements are necessary like on an individual basis from plaintiff to plaintiff. Because the Government's rationale is to apply the requirements universally is the most important means to avoid circumvention. So --

THE COURT: So do you think -- I'm sorry.

MS. WYER: And my --

THE COURT: Go ahead.

MS. WYER: And my understanding, it would be the plaintiff's burden to explain why allowing an exemption for one of them would not interfere with the rationale behind universality.

THE COURT: All right, so your contention is that on an as applied challenge, the plaintiffs have the burden of showing that they have some deprivation -- they individually have some deprivation of a right, is that right? And then if they show that, then the burden would shift to the Government to show some counterbalancing factor?

MS. WYER: That they have a burden I think goes to standing. So I think they've asserted that their burden therefore, they have standing to raise the as applied

challenge.

But then in order to make an as applied challenge to these requirements, you would have to explain why applying the requirements to your situation, your specific situation, would not -- would somehow not interfere with the rationale behind applying the requirements universally, which is the Government's -- the Government has consistently argued that the requirements must be applied universally because any other regime would allow circumvention. And all of the three previous jurisdictions that have addressed this have addressed the universality element of this scheme.

THE COURT: Well, can you cite a Supreme Court case that's ever enunciated this just the way you said it?

MS. WYER: Well, I think this is --

THE COURT: Or what's your best -- and maybe you'd rather -- maybe both of you want to put this in a supplemental brief, but I mean, I'd be interested in knowing you know, where the Supreme Court has laid all this out, that both of you seem to have such confidence is the law.

MS. WYER: Well, I'm not sure I see it as really a burden --

THE COURT: Well, I'm sure you don't, but the Courts have used that phrase lots.

MS. WYER: I think in terms of the facial challenge, I agree that it's the Government's burden. But where it's an

as applied challenge, presumably the scheme has already been upheld on its face, and the situation is that there the plaintiff would be having to overcome the facial validity of the scheme and why it should not apply in their specific situation.

THE COURT: All right. Well --

MS. WYER: And on the over-breath --

THE COURT: All right --

MS. WYER: On the over-breadth issue though, the plaintiffs do have the burden to show over-breadth.

THE COURT: All right. Now, Mr. Murray, I'm -- at least we have agreement on one thing. On strict scrutiny, the Government agrees that there is this burden.

Now you say that the -- that the Government just can't rely on congressional findings, the Government has to present evidence in a Court hearing to show that the -- that they meet their burden that there's a compelling state interest, is that right? And do you have a Supreme Court case that supports that view?

MS. WYER: Yes, I think the Playboy Enterprises --

THE COURT: You said -- well, we talked about that before. That's your case.

MR. MURRAY: -- put them to that very burden and held that they hadn't met that burden at the trial.

THE COURT: All right. Now on as applied, there

there is complete disagreement.

MR. MURRAY: Yes.

THE COURT: And you know, I'm going to give both sides a chance to address this in a supplemental brief if you want to. Okay.

Now, but let me get back to the preliminary injunction hearing. If we go down the preliminary injunction route, I assume you have the burden of going forward, by that I mean calling witnesses before the Government calls its witnesses, or no?

MR. MURRAY: Yes, we have to meet the four-part test, Your Honor.

THE COURT: Okay.

MR. MURRAY: I will concede that. We have to show a likelihood of success --

THE COURT: Right.

MR. MURRAY: -- we have to show irreparable harm, no harm to the public and no real harm to the defendant. And that is the burden --

THE COURT: Okay.

MR. MURRAY: -- at the preliminary injunction stage. At the final hearing, the burden is upon the Government to prove the constitutionality of its law.

THE COURT: All right.

MR. MURRAY: And I think that's all pretty well

established, those two propositions.

THE COURT: All right. Well, while we're talking about that and before we get to 2257(a), and I know the Government doesn't want me to address this until I've decided and denied the motion to dismiss, but since we're all here I think it makes sense to at least explore what the parties' view is.

Do the plaintiffs insist on having a preliminary injunction as opposed to a final hearing?

MR. MURRAY: We don't insist upon it, Your Honor.

THE COURT: Okay. So --

MR. MURRAY: If we could do it efficiently the other way, we would be perfectly willing to combine the two.

THE COURT: All right. Well, you know, I think it makes a lot of sense. I don't see a reason in this case to have a preliminary injunction hearing beforehand. And I saw somewhere that you thought six months of discovery would be sufficient, is that --

MR. MURRAY: I think we said 120 days.

THE COURT: Maybe it's the Government said six months, all right, you said 120 days. Okay.

And then we would go into a trial.

MR. MURRAY: Yes.

THE COURT: And does anybody assert there's a right to a jury trial here on any of these claims?

MR. MURRAY: No --

THE COURT: You're not seeking any damages, is that correct?

MR. MURRAY: That is correct.

THE COURT: All right, has the Government asserted a jury trial issue here or not?

MS. WYER: I have not looked at that but no. As far as I know, it has not.

THE COURT: All right, well, you need to come to grips with that at some point. All right. But if the plaintiffs aren't seeking damages, I'm not sure there are any jury issues. But that's not a ruling, it's just an observation.

Now, how long do you think it would take to present your case?

MR. MURRAY: I think we estimated a week.

THE COURT: You could present -- so you're not going to call all your plaintiffs?

MR. MURRAY: Oh, I will.

THE COURT: You think that would only take a week, to call all of them, with cross-examination?

MR. MURRAY: Maybe ten days. You're right, Your Honor, I guess --

THE COURT: I'm just getting --

MR. MURRAY: -- when you stop and think about it.

THE COURT: Do you intend to have expert testimony?

MR. MURRAY: Perhaps. I haven't made a final decision, but we might.

THE COURT: Okay.

MR. MURRAY: So you're probably right, it may take ten days, it might be two weeks for our case.

THE COURT: All right. Okay. And does the Government have any views on that, how long it would take?

MS. WYER: That sounds right.

THE COURT: Do you have any objection to going right to a final hearing as opposed to having a preliminary hearing?

MS. WYER: No.

THE COURT: All right. Now --

MS. WYER: We would prefer no hearing.

THE COURT: Well, I understand that.

Now, Mr. Murray says, and this is way before -- this is the cart well before the horse but I just want to ask it anyway. Mr. Murray thinks, he said at the final hearing you have the burden. Now are you saying the Government has the burden of proceeding or you would proceed procedurally by calling witnesses but the Government has the burden of proof on the substantive issues?

MR. MURRAY: Yes, Your Honor. We would proceed with our witnesses but the ultimate burden of proof and persuasion lies on the Government.

THE COURT: All right, well, I don't have to address that right now. Okay. All right. But that's helpful to know.

All right, now, I want to turn to 2257(a). Now, in my mind, if this is an over-simplification don't hesitate to say that. There are two aspects of 2257(a) that are different from 2257. One is the application to simulated versus actual sex. And the second is what I call the certification procedure, for which there is an exemption for a commercial producer.

Is that a fair summary, Mr. Murray, in your view or is there other things I should --

MR. MURRAY: It is, it is.

THE COURT: Okay. Now, on the first point, do you see any constitutional significance to the ban on simulated sex in 2257(a) compared to the ban on actual sex in 2257 in the context of the Sixth Circuit decision or otherwise?

MR. MURRAY: Yes. In two respects. It demonstrates that the statute keeps getting more expansive and covers a broader range of constitutionally protected material which implicates a vaster quantity of First Amendment protected material, which it seems to me requires an even greater justification by the Government.

And secondly, the one that I've already addressed, which is it, to me, proves that 2257(a) is content based

because whether you are burdened by all the record keeping and inspection and labeling requirements depends solely and entirely, not upon your business practices, not upon your industry practices, but upon the content of the material.

THE COURT: Well, but you see, we agree that -- and I don't know if -- you may be right that 2257 itself was enacted, it was amended, but we agree first of all that the Sixth Circuit didn't cover 2257(a), and that the certification requirement, or at least part of it applies to actual sex. Is that right?

MR. MURRAY: It applies to the -- to the lasciviousness aspect --

MR. MURRAY: Yes, which was also part of the Adam Walsh Act of 2006, and that was not before the Supreme Court.

See, what happened is in 2006, Congress amended 2257 to add lascivious exhibition of the genitals, and adopted, enacted 2257(a). Those statutes, however, didn't go into effect until March of '09 because the statute specifically said they wouldn't go into effect until regulations were promulgated which didn't happen till March of '09 --

THE COURT: Right.

MR. MURRAY: -- after the Sixth Circuit's decision in Wong (phonetic) and the '06 Adam Walsh Act came after we already filed our notice of appeal.

So lascivious exhibition of the genitals was not in

front of the Sixth Circuit, which is now in 2257(a) -- 2257, and no part of 2257(a) was before the Sixth Circuit.

THE COURT: All right, now, Ms. Wyer, do you agree with that little bit of legislative history?

MS. WYER: Yes. In terms of --

THE COURT: That's an accurate --

MS. WYER: -- chronology.

THE COURT: -- chronology. All right. Well, that's helpful, because I wasn't sure about that. Thank you.

Now, okay, so what I don't understand though is this. We talked about content based statutes. My -- and I understand your point about, that by making simulated sex illegal -- no, strike that -- making the reference to simulated sex have the record keeping requirements as does actual sex, you're saying Congress was making it more expansive and making it for over-broad than it already was.

But are you saying that from a constitutional point of view, and from the Congressional purpose of preventing child pornography, that the addition of simulated sex is a content based statute?

MR. MURRAY: What I'm saying -- yes. Well, first of all, we argued that both statutes are content based.

THE COURT: Right, well, I know that.

MR. MURRAY: So yes.

THE COURT: The Sixth Circuit clearly ruled that

2257 was not content based, that was the majority --

MR. MURRAY: The majority. The dissent agreed with that.

THE COURT: Dissent agreed, all right. Now, would you agree that under the same principles that governed the Sixth Circuit majority, that it would find that record keeping as to simulated sex was not content based?

MR. MURRAY: I think the majority would. But one of the things you have to understand about that majority opinion, Your Honor, is that procedurally it was a strange issue, the content based. Because what happened is the first time we argued the case, the 1998 opinion by the Sixth Circuit in Connection I held to be content neutral intermediate scrutiny.

Connection II said that was the law of the case, and we couldn't reargue the content based. So when it went en banc, we really didn't argue content based, because the prior panel had ruled that it was the rule of the case.

So it is true, the majority then did consider it on its own and say that it was content neutral rather than content based, but it was not an issue because of that procedural peculiarity of where we were when we got to the En Banc Court, the issue wasn't really litigated before the En Banc Court. But they did hold, as Your Honor indicated, that on their own, that it was content neutral.

But we think the Third Circuit, and of course Your

Honor obviously will look at the Third Circuit law --

THE COURT: Right.

MR. MURRAY: -- and the Supreme Court decisions, we think they got it wrong, because --

THE COURT: All right, well, I hear you but assuming for the moment that I -- well, let me put it this way. Assuming for the moment that I disagree with you about Brown and that I am prepared to follow the Sixth Circuit majority, that 2257 was not content based. Do you see any grounds to distinguish adding simulated sex to the statute on a constitutional basis?

MR. MURRAY: Only because of the difference in treatment, only because the difference in burdens that are imposed, which I've already alluded to.

THE COURT: Yes, but --

MR. MURRAY: But if the burden were identical --

THE COURT: And you think that's both factual -- that's both facial and as applied?

MR. MURRAY: Yes. Facially, since the burdens are different, it renders both statutes content based, an argument that the Sixth Circuit was never presented with because it hadn't happened at that time.

THE COURT: Yes, but from where I'm sitting, that's what they ruled, you know. I'm not -- you know, I hear you as to what went on there, but you know --

MR. MURRAY: They didn't rule on -- what I'm saying is they never were -- they couldn't have ruled on the issue of whether the 2257(a) distinction --

THE COURT: No, you're right --

MR. MURRAY: -- renders 2257 content based. We don't know what the Sixth Circuit would say had they been presented with that situation, because it wasn't ripe at that juncture.

THE COURT: Okay, well, I mean you're right about that.

All right, now let me ask Ms. Wyer for her response to this issue.

I'm sorry to make you get back and forth, but I think this is the best way to approach all these different issues.

MR. MURRAY: I appreciate it, Your Honor.

THE COURT: Yes.

MS. WYER: Our position is that the same, exact same rationale applies to 2257(a). And that the Sixth Circuit En Banc Court did discuss the issue in detail and come to a conclusion that it seemed to be making an independent determination there.

Also, the 1994 DC Circuit opinion addressed that issue specifically and talked about the rule that because -- held that again that the requirements were content neutral,

citing O'Brien and Renton, the Supreme Court cases about -- and Renton was the, where they upheld the restriction on adult movie theaters and zoning based on the secondary effects, holding that that was not content based because what the statute or the ordinance was getting at was something unrelated to the speech itself but it was addressing another harm, just as here the requirements are addressing another harm, whether you're talking about actual sexual activity or simulated. Both of those categories are in the definition for child pornography in 2256.

So it really makes no difference at all, the harm is the same whether it's simulated or actual activity there.

THE COURT: All right, well, Mr. Murray, I assume, but let me just make sure the plaintiffs -- as far as child pornography goes, you wouldn't draw a distinction between actual or simulated sex involving a minor?

MR. MURRAY: No, plaintiffs are opposed to all form of sexual abuse of children.

THE COURT: Right, okay. I thought that would be your response, I just wanted to clarify that.

Now, do you agree with what Mr. Murray said about the little bit of procedural history in the Sixth Circuit about what was argued in front of the Court en banc? If you know.

MS. WYER: I recall reading that, but I'm not sure

that that detracts in any way from the Sixth Circuit en banc decision.

THE COURT: I'm not sure it does either. I'm just asking if that was --

MS. WYER: I have not looked at the briefs to see whether it was discussed in the briefs to the en banc panel.

THE COURT: All right.

MS. WYER: I think the next issue is whether the certification scheme in 2256(a) makes a difference. I think it's clear that the plaintiffs here are not challenging the certification option as something that they are trying to overturn. What they seem to be saying is because there is this option for certain producers, it somehow makes the whole scheme content based. But I don't think that that argument really has any merit.

I think it mostly goes to the issue of narrowly tailoring versus least restrictive means, because we are arguing this is an intermediate scrutiny case and that is what the decisions of other Courts support.

The means that Congress chooses to address a problem do not have to be the least restrictive means. I think what plaintiffs are really saying is that the certification option should apply to everyone because that's a less restrictive means than the age verification and record keeping scheme that applies generally --

THE COURT: Well, let me hear what Mr. Murray wants to argue about that and then I'll give you a chance to respond.

MS. WYER: Okay.

THE COURT: All right, let's talk about certification. I mean, I think, Mr. Murray, you're objecting to both the concept of certification and as well as the exemption for commercial producers. Is that right?

MR. MURRAY: We think that the certification provision demonstrates constitutional flaws in the following ways. It renders 2257 content based, that's number one. Number two, it demonstrates that 2257 is not narrowly tailored because Congress has made the judgment that for those commercial producers who in the ordinary course of their industry practice already collect and maintain ID's, that the burdens of record keeping and labeling and being searched without a warrant need not be imposed upon them if they'll simply send a letter to the Attorney General. So it demonstrates that 2257 is not narrowly tailored.

We also think it deprives the commercial producers of actual sexually explicit material equal protection of the laws as guaranteed by the due process clause of the Fifth Amendment.

And we think that there's just no justification for the differential of treatment. I mean, for example,

75.9(a)(4) is a regulation. And it says, and this is interesting, "A producer of materials depicting sexually explicit conduct not covered by the certification regime, is not disqualified from using the certification regime for materials covered by the certification regime."

So what they're saying is you can have a single company producing both actual and simulated sexual films, and the adult industry historically has usually created an R-rated version of their sexually explicit films, but you can have a single company using the exact same business practices, with respect to both types of films, to ensure that minors are not used, complying with the same tax and labor laws and industry practices, and they can certify to the Attorney General for their simulated films, but they have to be burdened with all of the ramifications of record keeping, labeling and being subjected to a potential prison sentence of five years and being searched without a warrant for their actual explicit films.

And I can see no justification for that other than content. And if you can't justify something other than by content, that is black letter law for a content based statute.

And it doesn't -- and it's even true if the goal is worthy. And we agree that combating child pornography is a worthy laudable goal. But you still can't achieve that goal through a content based scheme. That's the Supreme Court's

teaching in the Simon & Schuster case, the Son of Sam case where they said it doesn't matter that the Government is achieving a laudable goal. They don't need to have an illicit motive. If they differentiate based on the content of speech, and it's not justified other than by reference to the content of speech, it's a content based distinction.

And we think that that is -- those are the constitutional ramifications of the certification regime that is promulgated in 2257(a).

THE COURT: Well, you know, if -- see, here's the problem I have with that argument, or at least the question I have.

If you were talking about having a comparison between actual -- and the goal is to prevent child pornography, which we all agree about -- and you have a distinction between movies depicting actual sex and movies showing a farmer raising plants. That would be a very sound argument. That's content based.

But where the distinction is between actual sex and simulated sex, we all agree that both are illegal in the context of child pornography. So therefore, why is that -- why does that make it content based -- why is that a content based distinction? Because in terms of preventing child pornography, they're both important, we all agree on that.

MR. MURRAY: Because they're treated differently

solely based on content. And the legislative history, which we've cited in our brief, what little there is --

THE COURT: You know, I'm a little familiar with the Son of Sam case and all about that, but you know, that's a whole different thing. I mean, can you cite any case that would support this argument that in purposes of preventing child pornography a distinction between simulated sex and actual sex is a content based -- is an unconstitutional content based variance.

But you know, without that, to be candid, I don't think I'm going to be the first judge to say that. Now, if you've got a holding for me, let me know about it, or put that in your supplemental brief, but I frankly doubt I'm going to be the first judge to come to that conclusion, because to be honest, it just doesn't make any sense to me.

MR. MURRAY: Well --

THE COURT: And I'm being very candid, I mean.

MR. MURRAY: Because the legislative history shows a preference in favor of its viewpoint discrimination. When you look at the legislative history, they did the certification for the Hollywood movies. And when you look at it, it says because they're good, they're First Amendment protected activity.

But these other people, these pornographers, they're bad. And therefore they have --

THE COURT: Well, probably some lobbyist from Hollywood, you know, convinced somebody in Washington to add this exception there so, because they said look, we already keep all these records and so forth, so why should we have to do it. So --

MR. MURRAY: But so do the adult -- the point is, that's exactly the identical position of the adult industry. They kept the records long before Hollywood did probably, because they were more concerned about --

THE COURT: But these are judgments that Congress made. Congress wanted to lessen the burden on mainstream Hollywood producers. So they said if you're going to put this simulated sex into commercial production, you know, you don't have to do this.

Now, but let me get to my point. I would like to know if you can cite a case supporting your argument that this is a content based distinction. Because we're all talking about this is in the context of child pornography. And I mean, I'll give you a chance to do it. I mean, I'm not looking for you to, you know, dream this up on the spot because none of us carry all this around in our head. But I'm just telling you that would be important to me.

MR. MURRAY: I think the closest would be the R.A.V. case that Justice Scalia wrote where he said that you can proscribe all obscenity because all obscenity is unprotected

by the First Amendment, but even in the spheres of obscenity, you can't ban obscenity with a particular viewpoint and not ban obscenity with another viewpoint. That's the R.A.V. decision, and I think it fits almost perfectly here. Because that's talking --

THE COURT: Forgive my ignorance, but do you have the citation?

MR. MURRAY: You know, I don't think I do. I'm not even sure I cited it in the brief, Your Honor. It just came to mind in response to your question.

THE COURT: Okay, well, you can put it in the supplemental brief.

MR. MURRAY: But I think that is pretty close to the very point that I'm arguing. You cannot be -- you cannot have viewpoint discrimination even as to unprotected speech. Then it's unconstitutional, even though all of it's unprotected, you can't pick out part of it to ban because you favor that type of obscenity, for example, over a different kind.

And that's what this is.

THE COURT: Okay. Now, let me go and ask the next question on my list, and then we're going to take a short break.

Do any of you -- well, first the plaintiff and then the defendant. Are there any Third Circuit cases that you can cite that would support your view on 2257(a) about the

exclusion of the commercial trade?

MR. MURRAY: You mean the exemption, Your Honor?

THE COURT: Yes, do you think that would -- yes, any Third Circuit cases --

MR. MURRAY: Yes, I think, as I said, I think the Brown case is the one case that --

THE COURT: Okay.

MR. MURRAY: -- that illustrates the point.

And I do want to stress, Your Honor, we've been talking so much about content based. I don't want the Court to think otherwise. We are convinced we have no problem defeating this law under intermediate scrutiny.

THE COURT: No, I understand that. I understand that. All right.

Ms. Wyer, why's your view about 2257(a) and either the Third Circuit or generally? You know, the -- well, the three things. The certification requirement, Mr. Murray says it's another -- makes it over-broad. He says that it's content based and that it's proven by Congress giving this advantage to commercial -- this exclusion to commercially produced movies, with simulated sex.

MS. WYER: First of all, I think this is really a situation where Congress in 1988 decided to put a certain material under this age verification and record keeping scheme, and then in 2006 it decided why are we not including

everything that if child performers were used would qualify as child pornography. So that's where 2257(a) and the inclusion of the lascivious conduct comes in.

But it's a well established principle as that Congress can address a problem in a piecemeal fashion. I mean, it's often an argument that is made, why is the Government regulating this when this is equally problematic, but Congress does not have to address everything at once. And that is -- that's pretty much what happened here, I think.

And the case, the Third Circuit case in support of that is cited in our brief, the Pollard case in our reply, 326 F.3d 397, quoting Williamson, a Supreme Court case. But I think that's a standard principle in the law.

So, just the fact that Congress did not include simulated activity before 2006, had no bearing on other Courts' determination that intermediate scrutiny applied. And it makes no difference now that Congress has included it.

In regard to the certification option, I don't even see that as a content based restriction. What it does is, is recognize that some, as you said, I think you explained it yourself, but some Hollywood studios are already subject to a host of requirements and Congress just made the reasonable judgment, well why do we have to make them do it twice. And so they allowed for this exemption.

But that's not a content based distinction in terms

of what images are produced. It's just a realistic, a reasonable determination that there are some industries that are already subject to requirements.

And we don't know whether such industries would even agree that it's less burdensome than the age verification and record keeping scheme at issue here. I mean, if you are subject to that regime, maybe you would say that that is more burdensome.

THE COURT: Okay.

MS. WYER: I don't think that really has any bearing on the question of whether it's content based because again, under Brown, the primary inquiry is whether the regulation is making a distinction based on disagreement with the content of the speech.

But here the certification option may apply to simulated, some simulated sexual activity, whereas it may not apply to other simulated sexual activity. It depends on whether the producer is already subject to requirements and can provide a certification that he is.

So I don't see that as a content based decision.

Again, what the plaintiffs seem to be seeking is a declaration from the Court that what Congress should have done is allow everyone to use the certification option, but that is not the role of the Court in this situation.

Unless -- and it's kind of doubling up on the

argument. It's saying this certification option both makes the requirement content based and therefore subjects the whole scheme to strict scrutiny, and it also shows that the means that Congress chose in the age verification and record keeping system is not the least restrictive means. It's kind of like doing both at once there where under the intermediate scrutiny regime, Congress did not have to choose the certification option for everyone. It chose a narrowly tailored system that simply -- that does not ban any form of protected speech, but simply requires that the producers check ages of their performers before including them in sexually -- recording them in sexually explicit films and photographs.

THE COURT: All right.

MS. WYER: And I think I already explained our view of the Brown case, its analysis of the exceptions in the statute for certain people to be inside the demonstrations on that is not -- that is distinguishable from here because there, there actually was a content based kind of distinction because pro-choice protesters would have been allowed to protest within the zone whereas anti-abortion demonstrators would be excluded. So that's a very different situation from this.

THE COURT: All right. I'd like to take a ten-minute break. When I come back, I'd be happy to hear from the Amicus if they want to speak for a few minutes. I'd like to

talk about the warrantless record search for the records. I'm going to have some other questions, some hypos, we'll hear closing arguments anybody wants to make, anything else they feel they left out, and so be back in about ten minutes. Thank you.

(Off the record at 3:24 p.m.)

(On the record at 3:43 p.m.)

THE COURT: Okay. All right, couple of miscellaneous, if I call them that.

In the Government's brief, the Government asked for a dismissal of some of the allegations because the plaintiffs haven't specifically defended them. One is the plaintiffs' vagueness -- of the allegations that the definition of sexually explicit conduct is vague. Do the plaintiffs still contend that it's vague?

MR. MURRAY: Yes, Your Honor. In at least one respect that one of the plaintiffs will testify to, and that is with respect to what is simulated sadomasochistic abuse, which is one of the triggers for the record keeping requirement.

THE COURT: Okay.

MR. MURRAY: She will testify that she's not sure what is covered and what isn't covered in her artwork. So yes, we do maintain that there is still a vagueness problem with at least that.

THE COURT: ALL RIGHT.

MR. MURRAY: As well as possibly simulated masturbation. It's hard to know what that is.

THE COURT: Okay. What about that the record keeping requirements violate the Fifth Amendment right against self-incrimination?

MR. MURRAY: Yes, Your Honor. No, we don't -- we do not, we did not intend to waive that argument by limiting the brief to some 57 pages or whatever it was.

The argument is very simple. When the law was first passed, they made a big deal, the entire Justice Department went in front of the Congress and said you've got to exempt, you've got to put in an immunity in the statute that it can't be used to prosecute anybody for any crime except for failing to keep the records; otherwise, it would violate the Fifth Amendment right against self-incrimination.

In 2003, in the Protect Act, they changed that, and they instead said that yes, you can now use all of these records as evidence of federal obscenity violations. So now everybody who keeps records of actual sexually explicit images, if the Government comes in and seizes the records, they can be used in a prosecution of those people for violating the federal obscenity laws. And we think under the Marchetti and Grosso line of Supreme Court cases, that that on its face violates the Fifth Amendment privilege against self-

incrimination.

The Sixth Circuit said that the issue wasn't ripe, just so that you know. We think it is ripe because people have to keep -- they're compelled to put down this information every day. And so we think it is a ripe claim. And it's that simple.

THE COURT: You also allege that some of the DOJ regulations were unduly vague. And I assume you don't waive that either.

MR. MURRAY: We don't, Your Honor. But I think that depends on some of the testimony that you'll hear as to specific applications.

THE COURT: All right. Okay. All right, now, would any of the Amicus like to speak up? Mr. Magaziner, good afternoon.

MR. MAGAZINER: Very briefly, Your Honor, if I may.

THE COURT: Yes, sir.

MR. MAGAZINER: First of all, I should tell the Court that we're grateful that you have given the Amicae an opportunity to argue orally. That's not something that happens very often.

THE COURT: Well, thank you for filing such a very well written brief.

MR. MAGAZINER: Thank you, Your Honor.

A very important point that has not yet been argued

by the parties is this. The Government has taken a position in its brief that the statute applies only to pornography intended for sale or trade. The Government took the same position in the Connection case in the Sixth Circuit, as Your Honor knows from having read the Connection III opinion, even the majority largely rejected that argument.

The Government has restated that argument or resurrected that argument in this case, and it still has said in its brief that the statute applies only to pornography intended for sale or trade.

If that is still the Government's position, we think it is a position without any merit whatsoever. Both on the face of the statute, and even in the Government's own regulations, that position is not tenable.

The face of the statute, going to the issue you were addressing just before the break, 2257(a) creates a distinction between materials that are intended for commercial distribution, that is intended for sale or trade, and those that are not. If indeed the statute only pertained to materials intended for sale or trade, there would be no need to distinguish between those that are intended for sale or trade and others. But in fact that's what the statute does.

It creates a very perverse distinction, as we pointed out in our brief, because a publisher of a, what's properly called girlie magazine with explicit photographs, is

exempt from the onerous record keeping government inspection regime, whereas a private individual taking the same photograph is not exempt, which is kind of a strange way for the Government -- for Congress to have written the statute, but that is what we did.

As we read the --

THE COURT: Well, it's strange, but is it unconstitutional?

MR. MAGAZINER: I'm not making the point that it's unconstitutional in that regard although one could make an equal protection argument. We don't have any clients here that I can bring before the Court and assert an equal protection claim. But I think one could be created out of that.

But the point I am making is --

THE COURT: If strangest was the test, Mr. Magaziner, there's little that Congress does that's -- that would pass muster.

(Laughter)

MR. MAGAZINER: Yes.

THE COURT: Maybe a little but only a little. All right.

MR. MAGAZINER: Not very much.

But the point I'm making, Your Honor, is not that it's unconstitutional --

THE COURT: I mean, look at RICO and how many times have you argued that RICO is vague and unclear and confusing. You don't have to answer that.

MR. MAGAZINER: I don't even put that in the top ten of strange statutes.

THE COURT: All right.

MR. MAGAZINER: The point I'm making, Your Honor, is quite different. It is in trying to figure out how to construe the statute, it's very hard to look at a distinction drawn in the statute between commercial materials and others, and then say that the statute is meant to apply only to commercial materials.

And then of course as we point out in our brief, the DOJ's own regulations having said in the preamble it's only intended for materials for pornography intended for sale or trade, when they get into actual regulations, they say it covers those who post explicit pictures on social networking sites.

Your Honor may well not be familiar with Craig's List --

THE COURT: I'm not. I've heard about them, but.

MR. MAGAZINER: Okay, and we described it in our brief, and if Your Honor wishes to do so, you could on your computer go back and access --

THE COURT: I always tell jurors they're not allowed

to go on the internet to do homework or get evidence, and I think the same ought to apply to me, so.

MR. MAGAZINER: Well, I think that's actually a wise decision that you're making here, but perhaps your law clerks would like to look at Craig's List. But there are lots of --

THE COURT: I never ask them to incriminate themselves.

MR. MAGAZINER: There are people who post pictures on Craig's List that are explicit and that would fall within the definition of actual sexual conduct because they're lascivious, by any definition, lascivious pictures of the genitals.

But to say that someone who posts such a picture in the hopes of attracting a sexual partner is engaged in creating pornography intended for sale or trade is to stretch that phrase out of --

THE COURT: Yes.

MR. MAGAZINER: As we read the statute, it covers not only private individuals, private couples, which the Sixth Circuit majority discussed and said they think it does cover it, but it covers as we pointed out, if you look at the literal language of the statute, it covers a sex manual that is published, that includes pictures of adults actually engaged in sexual activity; it covers art, because Congress in writing the statute did not take the time to carve out those

areas of sexually explicit depictions that the Courts carved out 40 years ago in distinguishing between obscenity and other sexual related materials; it covers sex education manuals; it covers art; it covers journalism, if a journalist happens to take such a picture. It's really an extraordinarily broad collection of activity that is covered here.

So we hope the Court will agree with us and agree with the Sixth Circuit majority that this statute sweeps far more broadly than the Government has taken the position it covers, and the Court will analyze the statute on that basis.

THE COURT: Thank you.

MR. MAGAZINER: Thank you, Your Honor.

THE COURT: All right. Mr. Solano.

MR. SOLANO: Your Honor, Mr. Magaziner has adequately described the position of Electronic Frontier Foundation, and so I won't burden the Court with additional argument.

THE COURT: All right. Well, thank you very much for filing your brief.

MR. SOLANO: Thank you, Judge.

THE COURT: Okay. Now let me turn to the so-called search and seizure issue -- well, no, wait, before that.

I took a minute during the break to look at the Playboy case. Now, Mr. Murray, and I haven't had time to study it completely but Playboy is clearly a strict scrutiny

case, correct?

MR. MURRAY: Yes, I said that.

THE COURT: You did say that. Now, so if I were to find that this case, as the Sixth Circuit said, was -- called for intermediate scrutiny, the Government's position, as I understand it, Ms. Wyer, and correct me if I'm wrong, is that whatever factual burden the Government may have in an intermediate scrutiny case, can be found from the Congressional findings.

Do you agree or disagree with that?

MR. MURRAY: I disagree with that. The only difference --

THE COURT: And what's the case citation you have --

MR. MURRAY: Well, just about all the cases in the Supreme Court that apply intermediate scrutiny, beginning with Turner Broadcasting, Renton, Alameda Books vs. City of Los Angeles, all the whole secondary effects doctrine when it comes to adult zoning and that type of thing, commercial speech cases which are intermediate scrutiny, Lorillard, the Lorillard Tobacco case where the Court struck down bans on advertising of cigarettes. They didn't just accept the findings, I think in that case it was of a state legislature.

The only difference between strict scrutiny and intermediate scrutiny on this point, there really isn't much of a difference. Under strict scrutiny they have the burden

of proving that the law furthers a compelling governmental interest. Under intermediate scrutiny, they have to prove that the law furthers a substantial governmental interest.

THE COURT: Or a legitimate, sometimes they use the word legitimate I think.

MR. MURRAY: Yes. Well, I think it's usually substantial, legitimate, substantial governmental interest.

But when it comes to demonstrating that very point, the proof is almost virtually the same. They still have to prove that there's a problem, and that the Government has a legitimate interest in solving, that's the governmental interest, there has to be a problem. And then they have -- it doesn't have to be compelling, it only has to be substantial. But then they have to prove that the regulation advances the governmental interest in alleviating that problems, and they have to do so by evidence.

Now in all of these cases, don't misunderstand me, Your Honor, they are entitled to go back to the legislative history. Don't misunderstand me. Even in Playboy, they always look at the legislative history and they always say well, this is what Congress had in mind and this is the problem that Congress thought they were solving, and this is how Congress thought they were solving the problem.

But they don't stop there, unless it is beyond debate at that juncture. But if -- but under either form of

scrutiny, they go further and examine whether there really was a problem, and examine whether the statute actually does further the governmental interest in solving that problem.

So to this -- as far as this particular argument is concerned, the fact that Playboy Enterprises was a strict scrutiny case really doesn't matter at this point.

THE COURT: Okay. All right, Ms. Wyer, what's your viewpoint of the law on this issue? And if you can cite a case, that would be helpful, or if you want to put it in your supplemental brief, that's okay too.

If you've covered this in your brief, just tell me where.

MS. WYER: I think that I did cite cases that indicate that the Government can rely on Congressional findings and common sense.

THE COURT: All right, where is this in your brief?

MS. WYER: I'm looking for the citation.

But I don't think the cases that plaintiff has cited actually require the Government to come forward with new evidence. And that's particularly true in the --

THE COURT: Well, I know you don't. I'm just looking for some citations, if you have any. Or why don't you just jot this down to put it in a supplemental brief. Would you mind?

MS. WYER: Okay.

THE COURT: Okay. All right. Or if you've already briefed it, you can just cite to the page number.

MS. WYER: Okay. I wanted to respond to the ACLU's point about -- particularly about the requirements --

THE COURT: All right, go ahead.

MS. WYER: I don't think that that is accurate, based on the 18 U.S.C. 2256 Subsection 11 expressly excludes depictions that are drawings, cartoons, sculptures or paintings from the definition of child pornography.

And there's a case that I found called Z.A. Ex Rel. Oswald, it's an unpublished case in the Eastern District of Missouri but it's a recent case that dismissed plaintiff's claim that the Protect Act was violated based on the defendant's alleged use of him in a sexually explicit cartoon. He was claiming that he was the model for the cartoon and that that violated the Protect Act. The Court held that 2256, the definition there excluded drawings, cartoons, paintings and sculpture from the definition of visual depiction and child pornography in that statute. And I have a copy of that, if that would be helpful.

THE COURT: Sure.

(Pause)

THE COURT: Thank you. Okay. All right, I want to turn to the -- you want to respond to that briefly?

MR. MAGAZINER: If I may, Your Honor?

THE COURT: Yes, sir.

MR. MAGAZINER: Subsection 11 to which the Government responds -- cites, is the term indistinguishable is defined in 2256 as -- because it appears in 2257(a) and 2257, simulated sex that is indistinguishable from actual sex is treated as actual sex. That's what -- if you look at 2257, 2257(a). And 2256 it defines what indistinguishable means. And then it says, "This definition of indistinguishable does not apply to depictions that are drawings, cartoons, sculptures or paintings depicting minors or adults."

But that doesn't mean that the rest of 2257 and 2257(a) don't apply to art. It merely means that the definition of indistinguishable does not apply to paintings and drawings. It's really quite off point.

THE COURT: All right, thank you.

All right, I want to turn to the search and seizure issue, so-called.

Now it's my understanding, Mr. Murray, that in the Sixth Circuit case, they dealt with a Fifth Amendment claim against self-incrimination, but they did not address the search and seizure, the Fourth Amendment issue, is that right?

MR. MURRAY: That is correct. And the reason for that is again, because the -- in 2006 in the Adam Walsh Act, for the first time, Congress added the provision that it's a felony now to refuse the inspection. And so that made the

Fourth Amendment issue front and center, whereas in the past it was not a crime to refuse the inspection.

THE COURT: However, if you go to the last paragraph of the Sixth Circuit en banc decision, there is all of a sudden out of the blue a reference to the Fourth Amendment. And I'm referring to -- okay, I'm referring to 557 F.3d at 343.

The last sentence reads as follows, the next to last sentence. They're talking about the Fifth Amendment not being ripe, but they say this. "At least until the Attorney General attempts to obtain Section 2257 records from these individuals, they face no greater risk of prospective harm than a claimant concerned that the Government will violate his Fourth Amendment rights in future services. C.F. Warshak 532 F.3d at 533." I haven't read that case yet.

So that seemed to me to virtually -- and maybe it's dictum, but they're sort of saying you know, we don't have to reach the Fifth -- well, that the Fifth Amendment is ripe for the same reason the cases hold -- excuse me -- the Fifth Amendment claim is not ripe for the same reason the cases hold that a Fourth Amendment claim would not be ripe.

Now, you were involved in this case. Maybe you know more about it and would like to explain what that means.

MR. MURRAY: Your Honor, I think it was a -- the only thing that I took from it is that it's a gratuitous

comment that has no bearing on what we're arguing today. It was in the context of the question of whether the Fifth Amendment claim was ripe.

THE COURT: All right --

MR. MURRAY: It's a gratuitous comment --

THE COURT: -- well, tell me why -- well, let me put it this way. In terms of the facial claim, there are cases and there are statutes, and the Fair Labor Standards Act is one of them, where companies are required to keep records, and the Government has the right to knock on the door and demand the production of the records.

Now, as a small, perhaps small footnote, I don't think any judge has ever said that means the Government has the right to swoop in and look in every desk drawer and you know, go through your belongings and so forth. It means that they can knock on your door and say we want to see your records, and you can bring the records to the front door.

But you can comment on anything that you may like. But to me, it's not exactly a search and seizure requirement. It's a production of records requirement.

MR. MURRAY: But this is different.

THE COURT: Why?

MR. MURRAY: Because they get to enter. You cannot keep them out of your door. You can't bring the records to them.

THE COURT: Well, the statute's not clear. You can enter, but it doesn't say, and I don't -- and I think that if you had a situation where they barged in and they you know, started going through every desk drawer, and let's say it's in an office and not in a home, so we don't get into this home is your castle situation. Let's say it's a business. Whether that would be appropriate.

I mean, sometimes you get into, you know, concepts of due process overriding the exact words of a statute.

But the point is, there hasn't been any of these, so why should I rule on it in the abstract? Now that's another question. But I'm happy to hear what your argument is.

MR. MURRAY: Thank you, Your Honor.

This claim is ripe, and it's ripe for a number -- first of all, if you look at the regulation, it is quite clear, unambiguous. "Investigators are authorized to enter without delay." So you can't keep them out. They have a right, without a warrant and without probable cause, to demand -- and without advance notice, to come to the premises, for the purposes of investigating whether you've committed a federal crime that can send you to prison for five years. They have the authority without a warrant, without probable cause, to demand and gain entry to your home or your business --

THE COURT: All right.

MR. MURRAY: -- for the purpose -- and the law is clear. Once an officer gains entry, that's a search.

THE COURT: Okay, well, let's talk about the facial challenge. All right. There are other statutes, and I'm not a student in this area, but there are other statutes that clearly allow Government regulators to make unannounced visits to someone and demand records. You agree with that, conceptually.

MR. MURRAY: The administrative search exception to the warrant requirement.

THE COURT: Okay, right.

MR. MURRAY: Berger, Camara.

THE COURT: Now if that has been upheld, then what's wrong with this on a facial challenge basis?

MR. MURRAY: Because those requirements are, it's got to be in a regulatory context, not in an investigation for a criminal -- of a criminal law, that's one of the requirements.

Number two -- actually the first requirement, it can only apply to a closely regulated industry. The Supreme Court has said that if it's not a closely regulated industry, the administrative warrant exception will not apply.

Now think about who this applies to. First of all, even if you just limit it to the adult entertainment industry, that's not a closely regulated industry by itself because the

First Amendment prohibits close regulation of constitutionally protected speech.

But it goes beyond that because artists, photographers, sex educators, private citizens who post their sexually explicit images, millions of Americans who put it on their cell phone, they've got to subject themselves to warrantless searches of their homes. It's not a closely regulated industry. And if it isn't, the Supreme Court has made it clear that they cannot rely upon that exception to the warrant requirement.

THE COURT: All right. And you've argued in your brief that -- the Government says well, this has never been enforced. Now the Sixth Circuit, where it was persuaded by that -- I mean, the Government said there, as I understand it, that well, look, you don't have to worry about that because that's not how we enforce these laws and we're not going to enforce this in that manner. And you argued that that is irrelevant, that it's dangerous the way it's written.

Now the Sixth Circuit rejected your argument, as far as I can tell, whereas the dissent thought it was very meritorious. But you know, there we go again.

But tell me what -- you know, whether, once again, as the Third Circuit opined on this issue, that I should be entitled to ignore what the Sixth Circuit held.

MR. MURRAY: Well, the Sixth Circuit never held

anything on this Fourth Amendment issue, Your Honor.

THE COURT: Right, but they --

MR. MURRAY: It was never presented to them.

THE COURT: But they did address your whole argument about enforcement in the context of the Fifth Amendment argument. They addressed your argument, as I understand it, about the enforcement and said well, the Government has said we don't enforce things that way.

Now if the Government said that about the Fifth Circuit -- if the Government said that about the self-incrimination provision in the Sixth Circuit, and they're prepared to say the same thing about how they would look for records in this context --

MR. MURRAY: Oh, no they're not. That's the difference. Because the regulation -- the difference is the regulation spells out precisely what they do. And every single inspection has to be done by the investigator in strict compliance with the regulation. So every single --

THE COURT: Let me ask Ms. Wyer what your view is on this matter. Mr. Murray is not done yet. I'm interrupting him for this point of view.

MS. WYER: Well, first of all, I think it's important to note that the statute says "any person to whom Subsection A applies who's subject to the record keeping requirements shall maintain the records required by this

section at his business premises and shall make such records available to the Attorney General for inspection at all reasonable times".

So, the statutory language does not even refer to entry at all. And the only thing subject to inspection under the statutory language is the records which the producers, we have argued, can have no expectation of privacy in records that they are creating only for purposes of complying with the statute. So --

THE COURT: Am I correct that the Government made an argument in the Sixth Circuit that you would -- you had certain enforcement parameters that should be respected? Isn't that correct?

MS. WYER: In the -- in regard to the Fifth Amendment issue --

THE COURT: Yes.

MS. WYER: I'm not familiar with the exact argument that was made, but it's definitely true that the enforcement -- the particulars of enforcement are very relevant to a Fourth Amendment claim.

THE COURT: And that's why you say it's not ripe.

MS. WYER: Right.

THE COURT: That you ought to wait and see how it's enforced.

MS. WYER: Right.

THE COURT: All right.

MS. WYER: And I also want to point out that that issue had to do with the inspection regulation which was promulgated in 2005. And the Connection plaintiffs amended their complaint after those regulations were promulgated and raised the Fifth Amendment issue in regard to the inspection. So they could have raised a Fourth Amendment issue about the inspections if they had wanted to at that time.

And in the Colorado case, they actually did raise the same Fourth Amendment claim, in the 2005 Free Speech Coalition case in the District of Colorado. And in that case, the Government moved to dismiss the Fourth Amendment claim, and the plaintiffs simply did not respond to the Government's arguments on that point, and the Court granted the Government's motion in its 2007 decision. In that decision when it's referring to Count 31, that's talking about the Fourth Amendment issue. It doesn't even refer to the Fourth Amendment because the plaintiffs didn't respond, so it just said that that claim -- the Government's motion on that claim is granted.

THE COURT: All right. Mr. Murray, sorry to interrupt you.

MR. MURRAY: That's all right. No, this is important, Your Honor, and I want to be clear that if you read -- when you read the statute and the reg, I am absolutely

certain that the conclusion has to obtain that every single inspection that will be carried out will violate the Fourth Amendment. There can never be an inspection under this regime that will not violate the Fourth Amendment because it will be done without a warrant and without probable cause.

And the statute proves that. The statute and the reg. The statute says, "Any person to whom this statue applies shall maintain the records required by this section at their business premises or at such other place as the Attorney General may by regulation proscribe, and shall make such records available to the Attorney General for inspection at all reasonable times."

Then it goes on to say, "It shall be unlawful for any person to whom Subsection A applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under Subsection C."

And it authorizes regulations. And when you go to the regulations, they are quite clear. "Investigators authorized by the Attorney General are authorized to enter without delay and at reasonable times any establishment of a producer where records are maintained to inspect during regular working hours. Advance notice is not required. Upon commencing an inspection, the investigator has to present his credentials, explain the nature and purpose of the inspection, indicate the scope of the inspection and the records that he

wants to inspect, and he's got to conduct the inspection so as to not unreasonably disrupt the operations. An investigator may copy, at no expense to the producer, any record that is subject to inspection" --

THE COURT: Well, let me just interrupt you for a minute. At page 43 of the Government's brief, Ms. Wyer, she -- and this is what I was sort of asking her about -- she says that the Government adopted certain regulations that were specifically raised by the plaintiffs and changed them so that producers may make their records available at the place of business of a non-employee, custodian of records.

Is that right?

MR. MURRAY: Yes, the regulation does --

THE COURT: So it doesn't have this Draconian effect that -- there's an option to produce them otherwise.

MR. MURRAY: No, what that means is you could retain a third party --

THE COURT: Right.

MR. MURRAY: -- to keep your records on his business premises. Then the Government gets to go into his business premises, same thing, they go back to the records, they're allowed to inspect them, our records, they're allowed to copy them, they're allowed to take those records out. It's just that the --

THE COURT: And that's what I started out saying.

This is not an unusual provision. There are many areas of the law where Government regulators are allowed to go to a business and demand to see records immediately. Isn't that right?

MR. MURRAY: No, no.

THE COURT: It's not right?

MR. MURRAY: It is not right.

THE COURT: It's not under the Fair Labor Standards Act there's not a --

MR. MURRAY: Only in the closely regulated industries.

THE COURT: What you're saying is that because your clients are exercising First Amendment rights, that they shouldn't be subject to what something who's -- you know, producing -- killing chickens or producing mushrooms or something like that.

MR. MURRAY: Not only that, but they can't do it at home, Judge. There's never been --

THE COURT: Well, let's --

MR. MURRAY: -- there's never been an inspection regime upheld by any Court that authorized the entry onto a home --

THE COURT: You may be right about that. But you know, just from sitting here, you know, it's really a stretch to say to some District Judge that I should strike this whole

thing down because there's some possibility that a Government agent may go to the home of somebody who's involved in adult entertainment or in art or an artist or something like that.

I mean, it's so fundamentally unfair that it's hard to envision a Government agent doing that, and that I should stretch out and say this whole thing is unconstitutional because there's a provision here that a Government agent could go to a home of say, a psychologist involved in counseling sex people who -- sex couples or sex addicts, and they have explicit pictures in their offices, and for that reason the whole statute is unconstitutional.

I mean, that's not the way judges think. I mean, I don't -- I've never seen an opinion like that. You're grasping at the extremist of extremities and saying because that's in there, the whole thing should fall. And that's just not the law, and I don't think you can find a case that's going to say that.

MR. MURRAY: Your Honor, I think that if they go to a commercial producer at his office without a warrant, without probable cause, to investigate a crime, and they demand entrance and they search through the records, the Supreme Court, as I understand their juris prudence, that is what's a violation of the Fourth Amendment.

THE COURT: What's a case that says that?

MR. MURRAY: Every case that stands for the

proposition that there's a presumption that you need a warrant and probable cause to conduct a search.

THE COURT: Well, just tell me one. I mean, I don't -- I think there are lots of cases that allow that. You've got the Fair Labor Standards Act, the IRS has that privilege in certain circumstances.

MR. MURRAY: The IRS can't come into my home and demand records. They can summons me --

THE COURT: Well, you may be right. But the Fair --

MR. MURRAY: There's process.

THE COURT: -- Labor Standards Act gives that right. I've got a case under the FLSA. They have, the Government has a right to demand records without a warrant and without notice --

MR. MURRAY: But I think --

THE COURT: -- on wage and hour compliance --

MR. MURRAY: Sure, but I think they have to issue an administrative summons. There's process at issue. It isn't that they can show up with the force of law and say you have to permit me to enter and I'm going to go search your records. They have to issue a summons. There's process. In all the cases you're talking about, Your Honor, there's process.

An IRS summons, a notice to produce records, a subpoena. There's no case out there, other than the administrative law exception cases, the Berger line of cases,

that upholds a search without a warrant under circumstances in which there's no other process, like a subpoena or a summons.

So no, this is, in my view, Your Honor, this is really just black letter law. And it's the Government in the statute that has promulgated something that is unique and that has never been attempted.

THE COURT: All right, Ms. Wyer, why about that argument? I mean, I think he may have a point there. That usually with administrative subpoenas, you do have a subpoena or summons. You go to the door under the FLSA, I mean, I don't remember this exactly, but an inspector has something to show the business owner, and this statute doesn't seem to require that. Or does it? Or are there regulations that have been enacted that would require it?

MS. WYER: The statute is so limited in that all that it authorizes is inspection of the very records that are created just to comply with the statute. This is a threshold issue under the Fourth Amendment, whether any expectation of privacy has been violated. And if there hasn't, it does not even qualify as a search.

THE COURT: Well --

MS. WYER: To the extent --

THE COURT: Let's use Mr. Murray's example. The inspector -- under the statute, and if there are regulations that bear on this, please tell me, because I'm not familiar

with them. Under the statute, a -- someone from the Department of Justice, you know, perhaps an FBI agent or maybe, you know, so we don't get into a criminal investigation necessarily, it could be somebody from the Civil Division, let's say you know, a lawyer, wants to go to a producer of adult movies. And they knock on the door, without any kind of document whatsoever, and they say we'd like to see your records of all your employees. All right?

No notice. You're saying that's perfectly valid. Now are there any regulations of this? Why hasn't the Department of Justice promulgated some regulations about the circumstances under which this kind of search can take place? Or have you, and I'm ignorant about it?

MS. WYER: Yes, the applicable regulation is 28 CFR 75.5.

THE COURT: 75 --

MS. WYER: Point 5. And there are two points --

THE COURT: What does that say?

MS. WYER: That describes the inspections. But I want --

THE COURT: Is this in your brief?

MS. WYER: Yes.

THE COURT: I'm looking at page 45. Is that where you talk about it?

MS. WYER: When I describe how the search procedures

are in compliance with the Berger standards --

THE COURT: Yes.

MS. WYER: -- I think I cite it there. Because the regulations require --

THE COURT: Wait, you see where we are, Mr. Murray?

MR. MURRAY: Your Honor, I actually read to you from those regulations. That's what I was reading from. It's on page 47 of our brief in support of our motion. It was the regs that I was reading from that authorized them to enter without delay and without advance notice and to conduct a search of the records and to copy the records and to take anything with them that they want. It even authorizes them to take any evidence of a felony that they find there.

THE COURT: Right.

MR. MURRAY: Those were the regs that tell you how the inspections are going to occur.

THE COURT: Do you agree, that's what she cited, was 75.5, right?

MS. WYER: Right.

THE COURT: Okay.

MS. WYER: And --

THE COURT: All right.

MS. WYER: I just wanted to make the point that the plaintiffs counsel keeps referring to the criminal penalty as if that is something quite unusual. But every administrative

scheme for inspection normally carries a criminal penalty. There was a criminal penalty issued in Berger if you didn't allow the inspections that were authorized there.

If there is like housing inspections, building inspections statute, usually failure to comply would subject one to criminal penalties. That's just a standard part of an administrative inspection scheme.

So there's nothing at all unusual about the fact that failure to allow the inspections authorized under 2257 would carry a criminal penalty. This is not -- this is not an investigation of a crime, as the plaintiff referred to it.

And the other thing is that this -- everyone has been on notice that anyone creating images subject to 2257 would be subject to inspections since 1988. This was a provision that was in the statute from the beginning. So at this point --

THE COURT: Well, I understand that.

MS. WYER: -- I think it qualifies as closely regulated to that extent. And that the records that you have to create for purposes of this scheme are subject to inspection, that is -- that aspect of producing these materials is closely regulated.

THE COURT: All right. Are any of you aware of any Third Circuit cases that would govern this issue? I mean, on page 47 the Government cites Showers vs. Spangler and if

anybody has any other cases on that, you can put them in your supplemental brief, okay?

MS. WYER: All right. Well, I would say the Professional Dog Breeders case is similar in that dog breeding is a kind of activity that any -- you can do it at any level, you can do it in your home, you can do it as an amateur activity, and yet everyone who engages in dog breeding is subject to inspections under the scheme in that case.

THE COURT: Well, what's your response to Mr. Murray's argument that a lot of his clients, if not all of his clients, are engaged in First Amendment rights and exercising them and therefore they're entitled to more protection than dog breeders or farmers or chicken pluckers?

MS. WYER: I think the scope of the inspections here is so limited that they are reasonable under the First Amendment and --

THE COURT: Well, why do you keep saying it's limited? I mean, they're allowed to go and see any records that they may have. I mean, there's no limitation --

MS. WYER: No. And this is not any records that the plaintiff happens to have in their filing cabinet. These are the specific records that are contained under the record keeping scheme that show that the producer looked at the identification of the performer. And these records have to be kept separately from any other records that the producer has.

And the DOJ when promulgating that requirement said that the purpose of that is in a way to -- is to facilitate the inspection, to streamline it for the sake of the inspectors, but it also prevents inspectors from rummaging through a producer's entire files. All the inspector is doing is looking at these -- those specific records that were created only for purposes of this record keeping scheme. These records, all they have is the identification of the performer. They're like indexed by the performer's name, and they say this performer was in this production, this is the website where this is, here's a picture of the image that shows that the labeling requirements were followed. It's all supposed to be kept in this very sufficient -- efficient manner so that all the inspector does -- the regulation requires that when the inspector comes, he has to present his credentials, explain the purpose of the inspection, including the limited nature of the records inspection, and that's the language in the regulation, and he has to identify the records that he wants to inspect. He has to explain the scope of the inspection that he intends to conduct in that case. He has to conduct the inspection so as not to unreasonably disrupt the operations of the producer.

THE COURT: All right, let me just -- all right, I see you've argued a good deal of this in your brief. Let me hear Mr. Murray's response and then we're going to move on and

come to a conclusion.

MR. MURRAY: Just a couple points, Your Honor.

They're going in to investigate whether somebody committed a crime. They're not going to see if there's a building code violation. That automatically takes it out of the administrative search --

THE COURT: Well, that's entirely fair. They're going in to see whether someone has kept these records. If they failed to keep the records, that could be a crime.

MR. MURRAY: Well --

THE COURT: But if somebody has kept the records, then the Government -- they want to see what the records are. And I'm going to come back to that in a little hypo I'm going to give you in a few minutes.

But it's only a crime if you haven't kept the records.

MR. MURRAY: Well, it's a crime --

THE COURT: And there's a lot of statutes that require people to keep records and make it a crime if you don't.

You know, going back to the Internal Revenue Service, you know, you and I, we're supposed to keep our records for six years.

MR. MURRAY: So they can civilly determine -- there's no civil component to this. At least the IRS has a

civil reason, an administrative reason, as do building codes, as do employment records. The only purpose for these records is a criminal statute. And if you don't keep the record the right way, you've committed a crime. They're investigating a crime, Your Honor.

THE COURT: Well, you keep saying that, but the purpose of this statute is to prevent child pornography. And you're right, if you ignore the requirements, then maybe you are committing a crime. But this is not like bank robbery, you know, where you're going to be sent to jail if you rob a bank. This is to prevent child pornography. That's the overriding reason here that everybody's got to keep in mind.

MR. MURRAY: But they didn't make it a civil penalty. They made it a crime not to keep these records and not to put the --

THE COURT: Because they want to be sure people do it. So deterrence -- that to me doesn't make it unconstitutional.

MR. MURRAY: Well, Your Honor --

THE COURT: I mean, I think you've got a very important argument about the procedural aspects of this, don't get me wrong. But, the concept of requiring the records does not seem to me to be unconstitutional.

Are you saying -- and I don't think you're arguing that keeping these records are unconstitutional, because

you've made the point that your clients and others in this industry have voluntarily made these records for years.

MR. MURRAY: No, the point on the Fourth Amendment is that it's a search and seizure. That's the point.

THE COURT: No, I understand.

MR. MURRAY: And Your Honor, I think it's important, again, I defy the Government to find any statutory scheme and set of regulations that authorizes what this set of statutes and regulations authorizes in the way of warrantless searches and seizures without some other form of process as a substitute, be it a subpoena or a summons or an administrative directive.

But one thing that I think -- I can't stress enough, Your Honor, most -- a huge number of people, including many of the plaintiffs in this case are photographers. Huge numbers of photographers, they're like one and two, two men and women operations. They keep all of their records in their home. They work out of their home.

All the photographers that are going to be subjected to the inspection for the most part are going to have their homes inspected. In fact, this regulation requires you, and we have a plaintiff who did it, if you're not -- if you don't keep regular business hours of at least 20 hours a week, you have to write a letter to the Attorney General telling the Attorney General what time of day and where his designee can

come in and inspect the records. And it's got to be at least 20 hours a week.

We have a plaintiff who will testify that he's written a letter to the Attorney General saying I will be available at my home for you to inspect the records between one and five, Monday through Friday. And now he's got to stay at home Monday through Friday.

But the point is, and I don't make that point only to -- because I'm not making an as applied challenge.

THE COURT: Here's -- yes, go ahead.

MR. MURRAY: It's on its face unconstitutional. There can never be an inspection under this regime that would satisfy the First and Fourth Amendments. And that's why it's proper for this to be struck down on its face, because in every single instance, the Government will be violating the Fourth Amendment requirement that there either be a warrant, probable cause, or some suitable substitute --

THE COURT: All right, okay, well, this gets to the ripeness issue. And I'm with -- I found the part of the Sixth Circuit majority that I'm talking about, where they say -- this was on the substantial over-breadth argument. And the majority decision, you know, considers your argument, and I guess it was you personally who made it, that the enforcement records -- this was where it was, I think you argued that this could apply against a husband and wife, and the Court rejected

that argument and said there's never been any enforcement about it. And the Supreme Court has -- and I'm paraphrasing now -- but the Supreme Court has never struck down a statute because of some extreme application that has been disavowed by the Government and never applied.

Is that a fair summary of what they held?

MR. MURRAY: Of what the Sixth Circuit held?

THE COURT: Yes.

MR. MURRAY: That's a passage from the opinion, yes.

THE COURT: All right. Why wouldn't that apply here? You're -- why shouldn't we await -- why shouldn't a ruling on this await an actual search and demand to see if it's done in a manner that offends the Fourth Amendment or offends due process or offends the First Amendment? Why should I, you know, be asked to strike something down that could be applied in a proper manner merely because it could be applied in an improper manner?

MR. MURRAY: It can never be applied -- there have been inspections, Your Honor, they'll be able to put on evidence, and FBI does it, that's who does it. FBI has done these inspections at various places.

And what I'm saying is, every single -- you cannot conceive of a set of facts in which they would conduct an inspection under this -- consistent with this statute and regs that would not violate the Fourth Amendment.

THE COURT: Oh, sure they can --

MR. MURRAY: I'm telling you every single --

THE COURT: The agent knocks on somebody's door, on -- let's leave it as a business, knocks on the business door, and says I'd like to see your records. The person says well, I'm busy right now, would you mind coming back in an hour or come back tomorrow. And the FBI agent says sure. And he comes back in an hour or the next day and he gives him the records. What's illegal about that?

MR. MURRAY: Because the compulsion. It isn't voluntary. You're not consenting to it. The law demands that he obtain entry without delay and you have no choice. So it's a search.

THE COURT: But I was just telling you, that you put in without delay, and the FBI agreed to delay, agreed to give him the opportunity to find the records.

I mean, it seems to me --

MR. MURRAY: But it would still, if he comes back, it's still a search --

THE COURT: Look, I'm not minimizing your argument. I'm just saying that it sounds to me like the Sixth Circuit rejected it.

MR. MURRAY: But Judge, we didn't have a Fourth Amendment argument in the Sixth Circuit.

THE COURT: Well, I understand that --

MR. MURRAY: So they couldn't have rejected it.

THE COURT: But the reasoning they gave --

MR. MURRAY: And they're wrong if they rejected it.

THE COURT: Well, now that's --

MR. MURRAY: And it's not consistent with the Third Circuit.

THE COURT: Now that's your best argument, that they're wrong.

Now the next question is where has the Third Circuit ruled that I can say the Sixth Circuit was wrong? Same question I asked when we started off today. And if you want a chance to brief that, I'll be glad to give it to you.

But I -- I'm sitting here as a sole District Court Judge, and I'm not looking forward to you know, the opportunity to say that an en banc decision of a Circuit Court where the Supreme Court denied cert is something I should ignore.

MR. MURRAY: Well, I think it's important to understand that the Sixth Circuit was not talking about a Fourth Amendment issue. They were talking about --

THE COURT: You're right, you're absolutely right --

MR. MURRAY: So they never ruled on this issue.

THE COURT: You're right, and I've said three times you're right, but it seems to me like that reasoning applies in the Fourth Amendment context. But maybe not. But I'm

asking you, or giving you the chance to cite a case or put it in your supplemental brief, if you want, you know, some Third Circuit ruling that would cast doubt on what I -- how I'm looking at the Sixth Circuit.

MR. MURRAY: I will, Your Honor. But we have Supreme Court precedent too that we think is --

THE COURT: Well, then why didn't the Supreme Court deny cert -- why did they grant cert if the Sixth Circuit is contrary to Supreme Court precedent?

MR. MURRAY: No, on this Fourth Amendment issue which was not raised in the Sixth Circuit or in the Supreme Court.

THE COURT: Well, I know you say there are lots of Supreme Court cases. I'd appreciate your citing me a couple that you think are most on point. And I'll give them careful --

MR. MURRAY: Thank you, Your Honor.

THE COURT: Now, I want to ask -- now I have a hypo, because you're right, that some of the cases say that you should test this against a hypo.

Now let me -- and this goes to the whole concept of what we're talking about here, in my view.

Let's talk, and I'll give you both a chance to expand on this and tell me where I'm wrong.

Let's say there's a husband and wife, they don't

have to be married but I'm just using that example, it could be any couple, it could be a male and female, it could be two males, it could be two females. But let's say they live together, and they engage in sexual conduct, and certainly there's nothing wrong about that. As a matter of fact, it's constitutionally protected clearly, regardless of whether they're married or not, in their own home.

Now, and they make a video of what they're doing. Certainly can still -- completely within the First Amendment. And let's say that they copy that video and they give it to a friend of theirs. Certainly that's within the First Amendment as well. Ms. Wyer, you would agree with that, so far?

MS. WYER: That -- I think so far the Government has taken the position that they would never apply the requirements to the actual creation of the video by the private couple.

THE COURT: Okay, all right. But you would agree that there's language in the statute vel non that might arguably say the statute would apply to that?

MS. WYER: Well, the Department of Justice in promulgating the regulations has interpreted the language, looking at the scheme as a whole, to not be focused on that situation. So they just don't interpret it that way.

THE COURT: All right, okay, well, let me -- all right, now. Let's say that couple has a child. And the child

is 18 years old, or 18 years or older. And that couple and their child, their adult child, over 18, the three of them participate in these sexual activities and are in the video. Okay? Would the Department of Justice believe -- and they make a video and they make a copy of the video and they give a copy to a friend.

Now, would this statute be implicated?

MS. WYER: That -- that is a very -- I think it just depends on, I mean, that has to await the actual situation.

THE COURT: Okay, all right, now --

MS. WYER: I can't --

MS. WYER: Next question, all right. The couple have two children, one is over 18 and one is under 18. And they have both their children participate in this sexual activity, and they video it and they make a copy of -- no, and then they make a copy of the video and give a copy to a friend.

Would the Government say the statute is implicated?

MS. WYER: I mean --

THE COURT: And leave aside whether it's a gay couple who have an adopted child or it's a heterosexual child and it's their own child or whether you know, they had a surrogate mother or anything like that. Let's leave all that aside. They recognize this as a child, one's adult and one's minor.

MS. WYER: Well, if a minor child is in this video that meets the definition of child pornography, and somehow the FBI becomes aware of it, I couldn't say that they would not apply their requirements, but more likely they would simply prosecute the individuals for child pornography.

THE COURT: Okay. All right. You think that might implicate child pornography because it involves a minor child engaged in sexual activity, right?

MS. WYER: Yes. Right.

THE COURT: Okay. Now, all right, now let's -- let me change the hypo a little bit. This couple, and they have an adult child, and then they invite another child, another younger person, and -- to participate in the video of sexual activity and they make a copy. It is not clear from the video whether that other child is over or under 18. Okay? You can't tell. Because some children are well developed at 15 or 16, and others are not that well developed, and I'm not just talking about a woman being well developed sexually, it could be a man, muscular content and body size and so forth. You just can't tell.

Would the Government contend that that activity would be subject to the statute?

MS. WYER: If they --

THE COURT: And that they should keep -- that couple should have a record of this other younger person, whether --

MS. WYER: In regard to whether the record keeping requirements apply, I --

THE COURT: Yes, well, I'm talking about the record keeping. I'm saying when the statute applies, they need to have a record of who -- their own child is 18, so it's not, okay, it's not a minor, but he is engaged in sexual activity and they made a video and they made a copy of the video.

Now, but they have this other younger person, and you can't tell from looking at this video whether that person is over 18 or under 18. Would the Government assert that the record keeping requirements apply?

MS. WYER: At this point, the Government has not disavowed the application of the requirements in that context. It has only disavowed the application of requirements to a private couple or intimate associates making --

THE COURT: Okay, all right. So, if the Government, say an FBI agent -- no, let me change my hypo a little bit.

They make a copy of this video and they give a copy to a friend. And the friend, it so happens, takes the video on a trip and takes a bus, and inadvertently leaves the video on the bus. So somebody picks it up and plays it and says oh, my God, this may be child pornography, and they turn it over to the FBI.

Now, in your view, would the Government be entitled to demand that this -- and let's say this is a small town and

they find out who is the adult couple in the video. Is the Government entitled to go to their home and say we would like to see your records of who are the two younger people in this video?

MS. WYER: I mean, I'm thinking that the way things would play out is that at that point they may have probable cause to conduct an investigation.

THE COURT: Well, let -- well, I'm not asking you whether the FBI could go and arrest them. I'm asking you whether under the statute the FBI could go and ask to see their records of identifying the two younger people in this video.

I mean, I don't understand why you're hesitating. It seems to me clear that under the statute they would have been obliged to keep a record of these two younger people and have proof of their age.

MS. WYER: Well --

THE COURT: And if they could produce records showing that both these other younger people are 18 or over, then they've not committed any crime and the FBI agent can go home and forget about it.

On the other hand, if they don't have the record, then they may have committed a crime of not keeping records. Or, they may be prosecuted for child pornography if the Government could prove that one of the children was under 18.

Isn't that clear?

MS. WYER: I think so. I think copying -- it depends whether it falls under the definition of producer and copying --

THE COURT: Well, they made a copy of the video.

MS. WYER: I believe that would qualify.

THE COURT: All right. Okay, now Mr. Murray, what's your reaction to these hypos?

MR. MURRAY: Your Honor, I think that the statute is clear. It covers every single one of the examples that Your Honor gave. There is just no -- there is no way --

THE COURT: Well, wait, it wouldn't cover the husband -- would it cover the husband and wife themselves making the video?

MR. MURRAY: Yes. Yes. If you read the statute, and again --

THE COURT: But see there, the Government's just claimed enforcement. Isn't that right?

MR. MURRAY: Yes. But Conchatta says that doesn't get them anywhere.

THE COURT: All right.

MR. MURRAY: The Third Circuit says that doesn't get them anywhere. And the two COPA decisions reject Government arguments that tried to narrowly construe the Child Online Protection Act.

They made very similar suggestions to the Third Circuit in those two cases and the Third Circuit said no, the statute -- the plain statutory language is to the contrary, so we can't accept your narrowing construction.

And this statute and regulation is clear. Whoever produces any picture is required --

THE COURT: Okay. All right, now, let's assume in this hypo that in my last hypo where they have the two younger people, one of them is their own child over 18 and a younger child. And let's say that younger child is under 18. Let's say it's very much younger, okay.

If that's the situation, then it would be by definition that these people, including their own adult child, have engaged in child pornography, correct?

MR. MURRAY: Yes.

THE COURT: All right, now, in that context, is there a -- is there a valid Government interest in having that couple maintain proof of age requirements for people who engage -- if they want to engage in sexual activity and make videos of it, is there a governmental interest in requiring them to keep records of the age of anybody who is involved in those video -- in a video of sexual activity?

MR. MURRAY: And the example is there are people under the age of 18 in that video?

THE COURT: Yes.

MR. MURRAY: The answer is, that's precisely my point, Your Honor. The statute -- the only -- the one interest the Government has is in applying this statute to child pornography. But the problem is, the reason it's over-inclusive, the reason it's over-broad, the reason it isn't narrowly tailored is because it applies to vast quantities of protected material involving adults which is not child pornography, and the Government is shifting the burden to these innocent Americans to prove that their material is protected when it's the Government who should bear the burden of proving that it's unprotected.

So yes, applying the statute to child pornography is fine. We don't complain about that. That would be a legitimate governmental interest. But applying it --

THE COURT: Well, how could you draft this -- well, two questions.

First of all, if I agreed with you, would it be within my power to say well, this statute is okay as long as it is only applied in certain instances, that is when minors are being used? Would that -- I mean, do I have the power to say I'm going to enjoin the Government from enforcing the statute in any situation other than where minors are involved in the activities that are -- for which record keeping is required?

MR. MURRAY: Well, as much as I'd like to say you do

have that power, probably you don't, because that would require too much of a rewriting of the statute. And there's only so much rewriting that a Federal Judge can do in such an instance.

In fact, the COPA decisions again are instructive, because they say we're not going to tell Congress how we would draft it and we recognize that that may create problems for Congress because they may not figure out what to do in response to our decision but we -- we don't have the power to completely rewrite a statute.

So unfortunately, Your Honor, while that would certainly help the plaintiffs, I don't think in all honesty that Your Honor would have the power to rewrite the law in that fashion.

But that's -- but you see, that's the whole point, is that whenever in the interest of combating unprotected speech, Congress also regulates protected speech. That's where the First Amendment issue arises.

THE COURT: But let me change my question slightly. Let's say that I agreed with you about your search and seizure argument, but I disagree with you about your other argument. And I'm just sort of dreaming this up, I'm not -- I don't know how I'm going to rule. I've got a lot more work to do.

But let's just say that was the conclusion. Would there be anything wrong with my upholding the statute insofar

as the record keeping requirements were concerned, but striking it down as to the method of the Government obtaining records and saying that it had to be done pursuant to a subpoena or search warrant or summons or something like that?

MR. MURRAY: Maybe. The only reason I'm hedging on that, Your Honor, is because I think the answer to that requires a consideration of whether it's severable or not, which in turn depends upon an examination of whether Congress would have adopted the statute without it and I think it's subject to argument. Maybe is the answer.

Under some circumstances you can sever the offending portion, leaving the rest of the statute intact. In some instances, you can't. And it really depends upon a test that is spelled out in the case law.

But Your Honor, the one thing I need to remind everyone in the hypotheticals is, there's more than just record keeping. You've got to put a label on the video. So every time that video or the picture that you're describing, no matter where it is, there should be a label on it saying where the records can be found, in which case it's a felony for the couple not to put a label on their images of themselves saying that the records can be found at 123 Mayberry Street, and that labeling requirement is a very burdensome and invasive provision of this statute as well. And I don't want to lose sight of that.

THE COURT: Okay. All right, let me have Ms. Wyer's response to this argument, and the hypos -- I extended the hypos a little bit.

MS. WYER: I think this shows that the Government's interest is in acknowledging the risk that there could be underage performers. The Government applies these requirements where there is a risk. So there's -- at this point, the way the statutes are drawn, there is a perfect fit between where the requirements apply and where there is a risk that child pornography would be created if underage performers were used in those images.

It does not apply to any image that, if it had a child performer in it would not qualify as child pornography. It only applies where the presence of a child in that image would make it unprotected child pornography.

So that is what the Government was aiming for is to recognize that risk and address that risk. So I think your hypotheticals illustrate that, where a child is in, is brought into this video, where there's like a group of unidentified people in the video and it's not between -- it's not only a communication between intimate associates, that's where there could be a risk of child pornography being created, whether intentionally or inadvertently. And the requirements -- Congress had a legitimate basis for addressing that.

THE COURT: Okay. What's your view of what I might

call -- what Mr. Murray referred to as the severability issue. Could I -- if I felt the statute was over-broad, do I have any power to enjoin the Government from enforcing certain aspects of it such as the search and seizure aspect or require an administrative subpoena or something like that?

MS. WYER: If we're talking about only the search provision, 75.5, it's important to recognize that that is a regulation. So, I actually think that this is most likely -- most likely it should be under administrative act review. If we're talking about a facial challenge to a regulation, it really properly falls under an APA challenge where what the Court would be examining is whether this regulation 28 CFR --

THE COURT: So you're saying I don't have jurisdiction, that they'd have to go through the Administrative Procedure Act in front of the Department of Justice to get that kind of relief? Before I -- like there's an exhaustion requirement, is that what you're saying?

MS. WYER: No, I don't think there's an exhaustion requirement. I think it's just that you wouldn't have to address the statute because the statute itself really has nothing objectionable in it, and the plaintiff's challenge really focuses on the --

THE COURT: Well, then you're saying it's okay if I just want to invalidate a regulation as opposed to a statute?

MS. WYER: In terms of severability.

But then also, you mentioned the Sixth Circuit's position regarding the inappropriateness of overturning an entire statute --

THE COURT: Right.

MS. WYER: -- based on a limited --

THE COURT: Yes.

MS. WYER: -- speculative possibility. And that was in the First Amendment context where the rationale for facial challenge is at its highest. And if you were comparing that to the Fourth Amendment context, there is -- the rationale for allowing a facial challenge or allowing a statute to be overturned on a facial challenge versus an as applied context is much lower.

THE COURT: All right. I'm going to give Mr. Murray the last word. If there's anything you want to say you haven't said yet. I've very much learned a lot today and I want to thank you for coming all the way from Cleveland. And as I said, I'm going to give both sides a chance for supplemental brief. We'll talk about that in a minute.

Is there any last few words that --

MR. MURRAY: Yes, Your Honor.

THE COURT: -- don't repeat what you said before that you want to add?

MR. MURRAY: Yes. I think it might be useful to bring us back to the procedural posture we're in. I think if

anything has been proven by today's spirited arguments, it's that we should survive a motion to dismiss, that we have plausible claims, and that what the Court really needs in order to fully adjudicate the various constitutional claims here is a full and complete record. And that if anything has been demonstrated, the motion to dismiss should certainly be denied.

We clearly have a statute and a set of regs that by everyone's concession applies to millions of Americans, both in the adult entertainment industry and not in the adult entertainment industry. Millions of Americans who post on YouTube, who post on the social networking sites which the Government says the statute applies to, they've got to put a label on their images with their home address, they've got to keep records.

Cell phones, she hasn't talked about that. Think about, even under sale and trade, cell phone to cell phone, across state lines, private citizens of a sexual image, they've got to put a label on their cell phone picture and they've got to keep the records. You can't avoid the staggering over-breadth. Journalists, sex educators, artists, private citizens, and adult entertainment producers.

The over-inclusiveness and over-breadth is staggering, Your Honor. But we certainly have enough to go forward and give you an evidentiary record so that the

ultimate decision can be made on a full record and not in a vacuum. Thank you.

THE COURT: All right, thank you.

All right, now the one thing I don't want in a supplemental brief is repeat of the arguments and citations given before. I mean there are certain discrete things I asked today that I would like you to cover.

I'd like to put a page limit on it, just so we have an understanding of what's going to be expected and I'd like this done fairly promptly, like within a week or two.

Ms. Wyer, what's your view? Would ten pages be satisfactory, double-spaced? I don't want a lot -- I asked very discrete questions I asked for supplemental authority on. I'm really just looking for citations or if you want to cross reference the regs or your prior brief, you know, that would be fine, and I'll read whatever you cite to me. I'm not looking for extended argument.

MS. WYER: Yes, I guess.

THE COURT: All right, ten pages. And I think you ought to -- well, I think you ought to file first, and then I'll give plaintiffs a chance to respond, because you're the moving party on the motion to dismiss.

MS. WYER: Okay.

THE COURT: Okay? How much time do you want?

It's only ten pages. That may take more time than

twenty pages, I know how lawyers think, having been one for many years myself.

MS. WYER: Two weeks?

THE COURT: Okay. All right, Mr. Murray, could you respond in one week in ten pages, or do you want another two weeks?

MR. MURRAY: If I could have two weeks, Your Honor.

THE COURT: All right, okay.

MR. MURRAY: But I have to say one more thing about pages because I was --

THE COURT: Yes.

MR. MURRAY: Last night as I was reading case law and preparing for this, I was struck by the fact that it took us all these long briefs, and I've got to ask you to read one more thing, Your Honor, because it's only two pages.

THE COURT: Yes.

MR. MURRAY: And this Judge Wald and Judge Tatel in the DC Circuit wrote a two-page dissent from the denial of rehearing en banc in the ALA vs. Reno case, and the two pages appear at 47 Fed 3d, 1215. And they captured in a little over two pages the essence of everything that I've tried to say today in hours and in about a hundred pages of brief.

THE COURT: I'll read it.

MR. MURRAY: And I'm embarrassed to say that.

THE COURT: Thank you. Okay. All right, so the

Government will respond, will have a supplemental brief in two weeks, and then the plaintiffs will respond two weeks after that. Okay?

All right, and I will do my best to come out with a decision not too longer after the supplemental briefs. But we're going to start working on it right away.

Okay, thank you very much. It was very well prepared. I want to thank the Amicus for coming today, and have a very nice weekend.

ALL COUNSEL: Thank you, Your Honor.

(Matter concluded at 5:00 p.m.)

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C E R T I F I C A T I O N

I, Sandra Carbonaro, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Sandra Carbonaro

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SANDRA CARBONARO

Diana Doman Transcribing _____

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